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IN THE

Supreme Court of the United States

October Term, 1971

AMERICAN AIRLINES, INC.,
Petitioner,

and

ALLIED PILOTS ASSOCIATION,
Intervener-Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

and

MASTER EXECUTIVE COUNCIL OF THE PILOTS OF TRANS CARIBBEAN AIRWAYS,
Intervener-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Citations to Opinions Below

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this cause on July 23, 1971. That opinion, not yet reported, is reprinted in the attached Appendix, at A12.*

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* A12 and similar upper-case A references are to the attached supplemental Appendix; references followed by a lower case a are to the Joint Appendix prepared for the Circuit Court (which has been certified by the Clerk of that Court and filed with this petition for certiorari).

The Circuit Court opinion affirmed two CAB Orders. The first, CAB Order No. 71-5-30, May 7, 1971, directed American to submit all pending disputes with respect to seniority list integration of the American and TCA pilots and flight engineers to arbitration; the second, CAB Order No. 71-6-71, June 11, 1971, denied a petition by American to reconsider the earlier order and to appoint a hearing examiner to deal with the matter. Order No. 71-5-30 is reprinted in the Appendix hereto at A30; Order No. 71-6-71 is reprinted at A23.

Jurisdiction

The opinion sought to be reviewed was handed down and entered on July 23, 1971. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 (i).

Questions Presented

1. Does the Civil Aeronautics Board, as a condition to its approval of a merger by air carriers, have the authority to modify and establish employee seniority rights without consideration of seniority positions established by collective bargaining agreements concluded pursuant to the Railway Labor Act?

2. (a) May the Civil Aeronautics Board properly release its decision-making authority concerning the determination and alteration of employee seniority rights to an unidentified, non-governmental arbitrator?

(b) If so, may the Civil Aeronautics Board delegate the responsibility for the selection of the arbitrator and the

establishment of procedures to the surviving carrier in a merger?

3. Can the Civil Aeronautics Board validly assert that a labor organization's participation in hearings on a carrier merger gives it jurisdictional authority to bind that organization by a decision of a non-governmental private arbitrator to whom the Board has released its decision-making responsibility when that decision will modify the labor organization's collective bargaining contract?

Statutes and Rules Involved

The statutes involved in this case are the Administrative Procedure Act, 5 U.S.C. §556 (b) (1964); the Federal Aviation Act, 49 U.S.C. §1302, *et seq.* (1964) and the Railway Labor Act, 45 U.S.C. §151, §151a and §152 (1964).

The applicable rules include Civil Aeronautics Board Rules and Regulations 14 C.F.R. §302.15 and §302.27. Also, Federal Register Documents "Reorganization Plan No. 3 of 1961", 26 F.R. 5989.

All pertinent parts of the above statutes and rules are set out in the Appendix hereto, at A1.

Statement of the Case

Basis of Jurisdiction

Jurisdiction in the United States Second Circuit Court was based on 49 U.S.C. §1486(a).

The Nature of the Parties

The parties to this proceeding include American Airlines, Inc., a certificated air carrier subject to the provisions of both the Federal Aviation Act and the Railway Labor Act, Title II; and the Civil Aeronautics Board. Two other parties have intervened. They are the Allied Pilots Association (hereinafter "Allied" or "APA"), the certificated representative of all of American Airlines' pilots, and the so-called Trans Caribbean Airways-Master Executive Council (hereinafter "TCA-MEC"); that party is, as we understand it, a subdivision within the Air Line Pilots Association (hereinafter "ALPA"), the latter organization being the representative of the TCA pilots prior to the date of the merger of TCA and American Airlines.

The Nature of the Proceeding

The instant petition arises from certain proceedings which were conducted before the Civil Aeronautics Board to determine the propriety of the proposed merger of Trans Caribbean Airways into American Airlines. As part of the Board's Order of December 18, 1970 approving the merger (24a), the Civil Aeronautics Board adopted labor protective provisions (136a) which provided *inter alia*:

> "Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, *provisions shall be made for the integration of seniority lists in*

a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13" (emphasis added).

* * *

"Section 13. In the event that any dispute or controversy (except as to matters arising under sec. 9) arises with respect to the protection provided herein, which cannot be settled by the carrier and the employee, or his authorized representative, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, etc., shall be agreed upon by the carriers and the employees, or the duly authorized representatives of the employees."

In conformance with the Board's Order, American Airlines (hereinafter "American") entered into negotiations with various groups of its employees. In every instance, save one, there was an agreed-upon integration of seniority lists upon a date-of-hire basis. That is, the incoming TCA employees were to be considered as having been employed by American from their initial date of employment by TCA. In negotiations with the pilot groups, this principle was accepted by APA but refused by the TCA-MEC.*

The date-of-hire seniority integration was incorporated in a document dated February 4, 1971, signed by American and APA and tendered to but not signed by TCA-MEC.

* Actually, the date-of-hire concept was accepted by the TCA pilots for the part of their group which consisted of men flying as flight engineers.

That document constituted a comprehensive agreement as to the conditions under which all of the pilots involved would undertake to phase into the operation of the total American route system (151a). Virtually all of the provisions of the agreement were approved and accepted by TCA-MEC with only two exceptions, the major one being the seniority integration point.

The agreement also provided for the treatment of furloughed pilots by applying to them the system prevailing under the current American collective bargaining agreement; that is, the last man furloughed was to be the first man recalled.

The TCA-MEC pilots, however, continued to insist upon other methods of seniority list integration. Acting on behalf of these pilots, the TCA-MEC, which was the local unit of ALPA that had represented the TCA pilots before the merger, on February 2 filed a petition to the Board asking that three-way arbitration be ordered to resolve all the pending seniority disputes, and for certain interim relief (143a).

Both American and APA opposed the TCA-MEC position and asked the Board instead to determine whether the method of integrating seniority lists agreed upon by American and APA, after full negotiations with all parties, was "fair and equitable" (144a at pp. 24-25; 150a). On March 5 TCA-MEC again urged arbitration, but also attempted to show that the American-APA agreement was not fair and equitable (175a at pp. 2-10, 18-19). At the same time, TCA-MEC, noting APA's determined opposition to arbitration, suggested that "if APA is serious in

its threat that it will refuse to arbitrate no matter what the Board says, the matter may as well'' be determined by the Board (175a at p. 18). On April 13 TCA-MEC filed a motion for expedited action, again suggesting that unless an arbitration agreement was executed within 30 days, the Board should set the matter down for hearing and decide it (204a).

In the face of these positions, the Board issued Order No. 71-5-30 on May 7, 1971 (A30). The Order required American to attempt to obtain agreement of all interested employee groups to an arbitration, including implementation of procedures for that arbitration. Failing agreement, American was to itself make all provisions necessary to proceed with the arbitration (A37). The Board's Order did not in any way identify the arbitrator or designate the procedures to be followed in selecting him. Furthermore, in the event that any group of employees refused to participate in the arbitration, American was to adopt procedures unilaterally (A37).

Although the Board's Order was directed only to American and did not purport to compel any employee representative to participate in the arbitration, it stated that the determination of the arbitrator was to be "final and binding upon all pilot and flight engineers of American Airlines (including the former TCA employees) as to which there exists a dispute with respect to seniority list integration * * *'' (A38). The explicit reasons stated in the opinion for the Board's rejection of a resolution of the disputes by means of its own procedures, as requested by American and APA and agreed to by TCA-MEC, were that arbitration was "appropriate" and that "the Board lacks expertise in labor matters" (A36, A35).

On May 28 American filed a petition for reconsideration of the Board's Order [illegible]. In the petition American pointed out that it was impossible to obtain agreement of the parties to either an arbitration or the procedure necessary to implement such an arbitration; that there was no assurance that an arbitration proceeding would have any final and binding effect and that, to the contrary, holding an arbitration could only lead to further litigation and possible industrial strife; that substantial doubts existed as to the identity of all proper parties and their representatives; and that the precise issues to be submitted to arbitration had not been defined by the Board.

American's petition suggested strongly that the Board take the same action it had taken in the North Atlantic *Route Transfer Case*, 13 CAB 835, 851; 14 CAB 910 (1951), upheld in *Kent v. Civil Aeronautics Board*, 194 F. 2d 263 (2d Cir.), *cert. denied*, 343 U.S. 952 (1952), and decide the open questions itself. More particularly it requested the Board to appoint a hearing examiner in accordance with its Rules to conduct further preliminary proceedings in the matter, to identify the parties and their authorized representatives and to determine the extent, if any, to which the seniority provisions in the American-ALPA agreement were not fair and equitable [illegible] at p. 10). ALPA joined in this petition (210a), and TCA-MEBA again indicated that it did not oppose resolution of the dispute by the Board itself (210a at p. 10).

Nevertheless, the Board, on June 11, by Order No. 51-71 (A23), denied American's petition for reconsideration and ordered American to proceed to arbitration within ten days after the date of service of the Order.

POINT I

The Court of Appeals has failed to properly reconcile the objectives of the Federal Aviation Act with national labor policy favoring collective bargaining.

There has hitherto been no carrier merger case in which an agreement for seniority integration reached by negotiations between the employer and the representative of the majority of employees has been completely ignored by the CAB. In this case, the collective bargaining process was employed and produced an agreement. Yet the CAB gave absolutely no weight to that agreement and the Court below confirmed the Board's action.

The Circuit Court's approval (A19) of the Board's "determination that arbitration was the appropriate method of integrating seniority lists in cases in which *the parties could not reach an agreement by negotiation*", (emphasis added), overlooks the fact that a collective bargaining agreement was reached in this case between American and the majority representative of its employees, the APA. The decision is in conflict with the principles in the Circuit's own decision in *McGuire* v. *Humble Oil and Refining Co.*, 355 F.2d 352 (2d Cir. 1966). There the Court* said, 355 F.2d at 357:

> "If the judgment below should be affirmed and the arbitration proceedings commence, there would be an obvious conflict between the interests of the Humble employees as a whole and the interests of the 13

* In reaching its decision the Circuit Court in the *McGuire* case distinguished *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964) in which only one union was involved.

> Humble employees who formerly worked for Weber & Quinn. If it be assumed that in the arbitration proceeding Local 553 would continue to represent the former employees of Weber & Quinn, it is not unlikely that they would press for an award giving these employees preferential treatment in the matter of seniority, job security, working conditions and other benefits that would adversely affect the other Humble employees. The result might well be unrest and dissatisfaction among the vast majority of workers in the plant. *Such a burdening of the collective bargaining relationship is clearly to be avoided, as a matter of national labor policy. The combination of the two unions, one representing all the employees and the other representing a minority, is on its face an anomaly.* Indeed, a mere glance at the 26 enumerated items of dispute proposed for arbitration will show that perhaps the principal purpose behind this action is to preserve the status of Local 553 as at least in some respects the bargaining representative of the former Weber & Quinn employees'' (emphasis added).

The Court concluded, as the CAB should have concluded with respect to TCA-MEC, that Humble had no duty to arbitrate with Local 553, a union representing a minority of the merged employees. It follows that agreement between APA and American is valid in the absence of any finding of overreaching. Under these circumstances TCA-MEC's failure to agree is not only non-essential but nullifying the collective bargaining agreement and forcing arbitration at the minority's insistence violates the national labor policy favoring negotiation with the majority representative of employees.

The plain effect of the CAB and Court decisions is to authorize arbitration of seniority questions at the instance

of any dissatisfied minority group. This is the single instance in labor relations under the Railway Labor Act (or the National Labor Relations Act) where compulsory arbitration is available at the insistence of any party (to say nothing of a minority group) for the fixing of *new* terms of employment. (Arbitration of seniority integration necessarily involves the creation of new rights or the alteration of old rights; unlike the arbitration of grievances it does not involve the judgment of claims against a fixed standard). We submit that the Civil Aeronautics Board action was an abuse of its discretion and contrary to the legislative intent expressed in the governing statutes when it refused to consider the results of the collective bargaining process and instituted a doctrine of compulsory arbitration in a single sector of airline labor relations.

If there is any doubt that Congress intended the Federal Aviation Act (the source of the CAB's authority) to be construed and administered consistently with national labor policy, that notion is dispelled by the statutory language making it a "condition upon the holding of a certificate by any air carrier that such carrier shall comply with Title II of the Railway Labor Act, as amended." 49 U.S.C. §1371 (k) 4.

Title II of the Railway Labor Act extends to air carriers the provisions of Title I governing railroads and establishes certain additional procedures for the disposition of grievances. The basic policy of the Act is set out in Title I and incorporated by the later Title.

The first four purposes of the Railway Labor Act are set out in 45 U.S.C. §151a, which provides:

> "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein;
>
> (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization;
>
> (3) to provide for the complete independence of carriers and of employees in the matter of self-organization;
>
> (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;"

The paramount purpose of the Railway Labor Act is certainly directly consistent with the major purposes of the Federal Aviation Act.

At the very least the Board should, therefore, have taken into account the procedures Congress has found desirable for the settlement of labor disputes in the airline industry.

It is amply clear that the Railway Labor Act is wholly void of any compulsion upon the parties to reach an agreement. Disputes as to the fixing of terms and conditions of employment are left to the extended processes of negotiation and mediation. There is no compulsory arbitration of such disputes although, of course, the parties can voluntarily agree to the arbitration of these matters. On the other hand, there is compulsory arbitration of disputes regarding the interpretation and application of agreements

(grievances), *Railroad Trainmen* v. *Chicago River R.R.*, 353 U. S. 30 (1957).

Under the Railway Labor Act the railroads and the airlines have somehow managed to resolve their disputes since 1926. The problems that have confronted the parties during those 45 years were at least as vexing, difficult and complicated as those arising from the integration of the seniority of some hundred or so TCA pilots into the American Airlines system. The whole thrust and design of the Railway Labor Act has been to vest the determination of these issues in the collective bargaining process. In those instances where the collective bargaining process fails, the Act provides that the parties *may* agree to voluntary arbitration but there is certainly no compulsion.

In other carrier merger situations in the past, seniority lists of employees have been integrated both by administrative action and by arbitration. However, in every single instance of arbitration which set new terms it has been pursuant to the voluntary *agreement* of all the parties. This was certainly plainly true in *Broth. of Locomotive Engrs.* v. *Chicago & Nw. Ry. Co.*, 314 F. 2d 424, 433 (8th Cir.), *cert. denied*, 375 U. S. 819 (1963), relied upon by both the CAB and the Court below.*

The Board has also undertaken to integrate the seniority lists itself where there has been no agreement by the carrier and the majority representative, *North Atlantic*

* *New Orleans & Ne. Ry.* v. *Bozeman*, 312 F. 2d 264 (5th Cir. 1967), the other case relied upon by the Court is wholly inapposite since it deals with the arbitration of a dispute as to whether a discharge was merger related; this is a "grievance" type of issue arising under labor protective provisions which the Petitioners herein have always agreed should be submitted to arbitration.

Route Transfer Case, 12 CAB 422 (1951), aff'd *sub nom. Kent* v. *CAB*, 204 F. 2d 263 (2d Cir.), *cert. denied*, 346 U. S. 826 (1953).* The power of the Board to act to protect employees in mergers is not controverted and petitioners take no issue with the authority of *United States* v. *Lowden*, 308 U. S. 225 (1939); however, that case which conditioned a railroad company's lease to another railroad company upon severance payments to employees cannot be any authority for the abandonment of the principles of national labor policy and the processes of collective bargaining.

The principles established in *Outland* v. *CAB*, 284 F. 2d 224 (D.C. Cir. 1960) (Burger, *J.*) indicate the proper approach to be adopted by the Board. In that case the integration of seniority lists was negotiated and an agreement reached by the parties. A substantial number of individuals claimed that the results were unfair and inequitable and petitioned the CAB to set aside the award. Finding there was no impropriety in the agreed-upon procedure followed by the employees' collective bargaining representative, the Board refused to act further and the Court confirmed the Board's action.

The principle established in *Outland* was not that the Board should always abstain from involvement in the determination of conflicting claims. Rather, the Court's thesis is that the Board may properly abstain by limiting its review when the issues have been resolved pursuant to a collective bargaining agreement (there an agreement

* Contrary to the Circuit Court's comment (A18), the relevant labor protective provisions in effect at the time of the *Kent* case were substantially the same as those adopted in the *United Capital Merger* case, 33 CAB 307 (1961) and again in the current case.

to arbitrate). The same kind of review was conducted by the Board in *Outland*—one which would protect all minorities from overreaching—as was urged by the Petitioners in the instant case. It is the type of review which has been developed by the Courts for the protection of minority rights under the Railway Labor Act and could be as adeptly utilized by the Board in an administrative context. Thus §152, Fourth of the Railway Labor Act explicitly states that "the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." The very wording of the statute suggests that there be a minority and we submit that neither the Congress nor the Railway Labor Act intend that the rights of the minority be disregarded even though the power to reach an agreement is vested in the carrier and the majority representative, *Virginian Ry. Co.* v. *System Federation, No. 40,* 300 U.S. 515 (1937).

Congress realized that no agreements could ever be reached by negotiation if every minority group and every dissident view had to be satisfied first. However, the law under the Railway Labor Act also developed the appropriate restrictions, and through this Court established the duty of fair representation. *Steele* v. *Louisville & Nashville R.R. Co.,* 323 U.S. 192 (1944). The early cases concerning the duty of fair representation were directed to instances of racial discrimination where arbitrary, unfair or inequitable considerations influenced the decision of the majority representative. Later, the doctrine was extended to other motives for unfair representation. *Mount* v. *Grand Intern. Broth. of Locomotive Engrs.,* 226 F. 2d 604 (6th Cir. 1955), *cert. denied,* 350 U.S. 967 (1956).

The duty of fair representation has been invoked by affected employees covered by the Railway Labor Act to review seniority integration; sometimes successfully, *Tischler* v. *Airline Pilots Ass'n,* 67 LRRM 2579 (D.C.S.D. Fla. 1968) (not officially reported), and sometimes unsuccessfully, *Crowley* v. *Locomotive Engrs. Div. 28,* 75 LRRM 2036, 472 P.2d 106 (Ariz. Ct. App. 1970). The point is that the right exists, as does a procedure for its vindication. *Cf. Czosek* v. *O'Mara,* 397 U.S. 25 (1970). In a merger situation, arising in the first instance from the Board's approval of the carrier's economic action, there is no reason why the Board should not pass upon whether the integration agreement is fair and equitable. The Board certainly has as great a capacity to perform this function as does a court. Moreover, the prospect that the Board will undertake this review is certain to prompt the majority representative to act with particular care in its dealings with the carrier.

The Board did not even consider the agreement that had been made between the majority representative and the carrier. It did not consider whether the agreement was fair and equitable or whether minority rights had been protected. The Board did not apply the same standards to the evaluation of a negotiated settlement as it has to privately agreed-upon arbitrated settlements over which it has equally little control. See *Outland* v. *CAB, supra,* 284 F.2d at 228.

The Board and the Court below have failed to perceive certain fundamental theses of labor law. The first is that labor contracts and labor arbitration awards are both the creatures of private voluntary agreement and often stem

from the very same processes of negotiation, compromise and accommodation; an arbitration award delivered outside the Board's knowledge and control deserves no sanctity that the parties' own agreement has not conferred upon it. Second, national labor policy prefers the negotiated settlement on the grounds that the parties most directly concerned are the best suited to arrive at conclusions which will be most effective in the industry in which they serve; *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U.S. 242 (1943); *Division 1287 of Amalgamated Ass'n of St., Elec., Ry. and Motor Coach Emp.* v. *State of Mo.,* 374 U.S. 74 (1963); *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964); *Teamsters, Local 24* v. *Oliver,* 358 U.S. 283 (1959). This would be nowhere more true than on questions of seniority in the technologically advanced, highly scheduled airline industry. Finally, the interests of minorities or dissidents should be protected by the majority representative's enforceable duty of fair representation. There was absolutely no reason for the Board and the Court to depart from these principles and introduce the alien concepts of compulsory arbitration in a single, yet vital, area of airline labor relations.

As the Supreme Court has indicated in *Burlington Truck Lines, Inc.* v. *United States,* 371 U. S. 156 (1962) at 172, where an administrative agency has a choice between two courses of action, one which would effectuate the policies of the labor statutes involved, and one which would not, the agency is under a duty to consider the consequences of its alternatives and to select the method which will best effectuate the national labor law policies.

POINT II

An administrative agency may not at will delegate decision-making responsibility to unidentified, private third parties.

The Board and the Court below take the position that "What the Board can do, an arbitrator appointed pursuant to its order can likewise do" (A20). As a general proposition, this is patently wrong.

The Civil Aeronautics Board is vested with the responsibility for the administration of the Federal Aviation Act. Its members are appointed by the President and approved by Congress. 49 U.S.C. §1321. Presumably, Congress intended that the Board should exercise the authority with which it has been vested. In the *Kent* v. *CAB* case, 204 F.2d 263 (2d Cir. 1953), *supra,* the Board responded to the union's refusal to submit to arbitration by undertaking the decision-making responsibility itself and that assertion of authority was the issue being presented to the Court. In those instances where Congress was willing to permit a delegation of authority under the Federal Aviation Act to private persons, it specifically provided for that, as in 49 U.S.C. §1355(a).

The Board's own Rules and Regulations, as set out in 14 C.F.R. §302.27(a), discuss in detail the limits of the Board's delegative authority to governmental hearing examiners and the Board's review of those examiners' decisions (A9, A10). This Regulation, as it states, is derived from "Reorganization Plan No. 3 of 1961," 26 F.R. 5989. That Plan specifically provided that the Board "shall have

the authority to delegate, by published order or rule, any of its functions to a division of the Board, an individual Board member, a hearing examiner, or an employee or employee board" provided that this Regulation was not deemed to supersede Section 7 (a) of the Administrative Procedure Act. 5 U.S.C. §556 (b). Thus, it is plain that in both the Board's own Regulations and the source of those Regulations, it has never been contemplated that authority of any kind (to say nothing of the critical matter involved here) should be delegated to anyone other than a governmental official.

We would emphasize that the Board's operative orders directed one of the interested parties, American Airlines, to attempt to set up an arbitration by agreement. If American is not successful in promoting that agreement, it has the sole responsibility for establishing the arbitration. Thus, not only is the Board itself not going to decide the issues of seniority integration, but it doesn't even know who is going to make that decision or—to take it one step further—who is going to make the decision as to who is going to make the decision. At the best, the CAB must defend its delegation by saying that it has vested this authority in American (one of the interested parties) to pick the individual who will decide upon the rights of all of the other interested parties and individuals.

It is axiomatic that any delegation of authority to private parties is permissible only to the extent it is explicitly permitted by statute, *Delegation of Power to Private Parties,* 37 Col. L. Rev. 447, 448 (1937). Federal courts reviewing agency delegative power have refused to enforce

Board orders giving arbitrators the power to make the ultimate legal decision:

> "In the absence of express provisions establishing such a scheme, it [the Railway Adjustment Board] had no authority under the Act to submit the ultimate decision of a case outside the agency." *Hoopes v. Atlantic Coast Line R.R. Co.*, 311 F. 2d 450 (5th Cir. 1962).

In *Western Airlines Inc. v. C.A.B.* 194 F. 2d 211 (D.C. Cir. 1952), the Court rejected an improper Board delegation of authority to an arbitrator. That case is significant because in holding that the Board could not delegate its authority the Court drew the distinction between the forced arbitration of a *procedural* type of dispute (*e.g.*, discharge for "cause") and the establishment of *rights* through an independent, third-party, private arbitrator.

The Board's attempt to abandon its decision-making obligations and delegate them to private third parties is clearly contrary to the Administrative Procedure Act. As Reorganization Plan No. 5 *supra* indicates, the Board's Regulations are not intended to supersede Section 7 of the Administrative Procedure Act, 5 U.S.C. 1006 (a) *supra*. Thus, while the Reorganization Plan indicates a scope of delegation which would have included reference to "an employee" of the Board, the controlling statute limits such delegation to "one or more members" of the Board or to "one or more examiners." The extent of these limitations was directly considered in *Simplex Electronics, Inc. v. Christenberry*, 169 F. Supp. 741 (S.D.N.Y. 1959). That case fully considered the controlling nature

of 7 (a) and reviewed the policy lying behind Congressional insistence that critical determinations of the type considered here shall be heard before "qualified, impartial Hearing Examiners who would not be mere 'rubber stamps' ". In a labor relations context, the Court in *Burk Bros.* v. *N.L.R.B.*, 117 F. 2d 686 (3d Cir. 1941), emphasized that even where the initial decision concerning the employees' rights had been made by a trial examiner, the Board itself was compelled by statute to make the final determination. Thus, in that context, the right of the employee to rely upon the Board's exercise of its own authority was preserved.

In *Krug* v. *Lincoln National Life Insurance Co.*, 245 F. 2d 848 (5th Cir. 1957), the court set out the distinctions between the types of authority that an administrative agency can delegate and the authority which it must reserve for its own exercise, saying, 245 F. 2d at 852:

> "It is more or less elementary that while an administrative body cannot delegate quasi-judicial functions, it can delegate the performance of administrative and ministerial duties and, where it is impossible for them to be performed in person, it must do so."

The Court below condones this delegation of power on several grounds. First, it merely states that the Board has broad power to do as it chooses, citing *United States* v. *Lowden*, 308 U.S. 225 (1939) (A18). We have already pointed out the inapplicability of the *Lowden* case and the other authorities upon which the Court relies, *supra* at 14 of petition brief.

Another reason suggested is the Board's evaluation of the best use of its "limited budget, both of money and of

time" (A18). We don't recall the Board having made this argument below and to accept it as a rationale for administrative abstention would be to invite any agency to reject those issues vested in its jurisdiction which are complex, novel or simply politically unwise to decide. All agencies are in constant budgetary crises. Could the Board resolve its problems by saying that "this year we will consider only rate cases; all route cases will be submitted to a private arbitrator who will be picked by the contending carriers."? The protection of employee rights in a merger case is just as much a part of the Board's jurisdiction as any other merger aspect and cannot be renounced because of the imposition it makes on the Board's budget. Under our governmental system of checks and balances, Congress enacts laws that must be administered by other governmental bodies. Congress also controls the appropriations that enable an agency like the CAB to act efficiently and expeditiously. If Congress does not appropriate sufficient funds, the administration of its own statutory enactments will be delayed. That being so, Congress must determine whether to endure that situation or allocate more money. Indeed, Congress could even amend the law to limit its scope. But that is a decision for Congress and not the agency to make. Moreover, if the agency usurps this Congressional authority, it is also short-circuiting the very process which is *intended* to put pressure on Congress to decide how effectively its laws are to be administered.

Although as realists we are aware of the extent to which administrative agencies do in fact fail to exercise the jurisdiction conferred on them, it is a practice which has evoked a great deal of criticism by commentators of the administrative process. See, among many, Jaffe, *Law Making by*

Private Groups, 51 Harv. L. Rev. 201 (1937); *Delegation of Power to Private Parties,* 37 Col. L. Rev. 447 (1937), *supra;* 1 Davis, *Administrative Law* §4.08, p. 261.

Prevalent as the practice may unfortunately be, it is hardly judicious for the Circuit Court to condone such practice by affirming the Board's Order on the grounds of its "limited budget, both of money and time."

The final reason offered in support of the Board's delegation of authority is its asserted lack of expertise in labor matters. The Circuit Court points out that the Board may change its mind as to what policy it may adopt toward arbitration (A18). However, that does not alter the fact that the Board was expert enough in 1951 to integrate seniority lists in the *Kent* case but now has somehow lost that expertise. The Circuit Court cites *Outland* v. *CAB,* 284 F.2d 224 (D.C. 1960), *supra,* to support its view that the Board lacks "expertise in labor matters" but, of course, the Court in that case was approving the abstention of the Board *where the parties had agreed.* In the instant case, instead of upholding *or even considering* the agreement between the majority representative and the airline, the Board intruded in labor matters in the most vigorous conceivable manner when it effectively nullified that agreement. The *Outland* case supports our view that consistent with national labor policy the Board should encourage the *voluntary* resolution of disputes by negotiation *or* arbitration. But where a fair and equitable result has not been achieved through agreement, the Board itself must take the responsibility and it has the capacity to do so. As the Court said in *Hyland* v. *United Airlines,* 254 F. Supp. 367, 372 (1966):

"It may be true, as a general proposition, that the CAB's 'experience and expertise is with transportation not labor relations problems.' Outland v. CAB, 109 U.S.App.D.C. 90, 284 F. 2d 224, 228 (1960). Nonetheless, the CAB has acquired extensive experience and expertise in the special areas of labor relations which necessarily fall within its duties under the Aviation Act.

"Control over seniority list integration is basic to the regulatory scheme administered by the CAB pursuant to §408 of the Aviation Act; the success of the merger may be at stake. Uncoordinated, unsupervised attempts to resolve this particularly troublesome problem may result not only in industrial strife, but also in an inefficient or uneconomic operation; the merger, its purposes, and the public interest against which it is tested may be threatened. See United States v. Lowden, 308 U.S. 225, 238, 60 S.Ct. 248, 84 L.Ed. 208 (1939); Kent v. CAB, 204 F.2d 263, 265 (2d Cir. 1953). If the CAB properly and thoroughly performs its duties pursuant to §408, it cannot ignore the inevitable labor problems created by a merger."

The fact is that the Board has procedures already established, it has facilities already available, its decisions are entitled to greater respect because they are subject to judicial review; being familiar with the airline industry, it probably has greater expertise in solving the problems of the parties than some *ad hoc* private arbitrator that has just settled a major dispute in the coal fields.

Having made its excuses for the Board's illegal delegation of authority, the Circuit Court adds a finding to the effect that,

"In any event, the time for challenging the legality of that provision in the order of December 31, 1970,

had expired before the filing of this action. 49 U.S.C. §1486(a)."

It was petitioner's view that the original labor protective provisions sanctioned an agreement between the majority representative and the carrier which, if it were fair and equitable, would not be subject to compulsory arbitration; therefore, the petitioners had nothing they wished to appeal. The need for review arose only after the Board refused to consider the APA-AA agreement and *ordered* arbitration. The Board and all the parties have treated those orders directing American to establish an arbitration procedure as the ones under review; certainly this was the view of the Board which in its most recent order invited American to seek judicial review (A25). There was no basis for appeal or review until those orders were entered and the instant petition is therefore timely. *Oling* v. *Air Line Pilots' Ass'n*, 346 F. 2d 270 (7th Cir. 1965), *cert. denied*, 382 U.S. 926, makes it plain that the right to judicial review runs from the date of the Board's Order directing the manner of seniority integration rather than from the date of the original protective provisions. To the same effect is *Outland* v. *CAB*, 284 F.2d 224 (D.C. Cir. 1960), *supra*. To the extent that the instant Circuit Court's decision differs from these authorities, there is a conflict in the Circuits.

POINT III

The Circuit Court erred in concluding that APA, as an intervener in an administrative proceeding, was bound by the CAB order directing American Airlines to arbitrate.

The Circuit Court asserted (A21) that since Allied Pilots took an active part in the proceedings before the CAB it was bound by the CAB order directing American Airlines to arbitrate. As authority, the Court cited ALI Restatement of Judgments §79, p. 356. This is a novel and far-reaching ruling which is unsupported by any decision of this Court or by any authority cited by the Circuit Court. The ruling effectively amends the CAB's statutory authority and extends its jurisdiction beyond the limits prescribed by Congress. It may have far-reaching effects upon the willingness of representative groups and interests to provide information and participate in administrative proceedings.

The Court completely failed to make any distinction between the formality of intervention in a court proceeding and the informality of an administrative hearing. Other courts and commentators have made clear the distinction based on the differing nature of the proceedings. *American Communications Ass'n* v. *United States*, 298 F.2d 648 at 650 (2nd Cir. 1962); Boros, *Intervention in Civil Aeronautics Board Proceedings*, 17 Ad. L. Rev. 5, 19 (1964); *Intervention by Third Parties in Federal Administrative Proceedings*, 42 Notre Dame L. Rev. 71, *et seq.* (1966-67); Davis, *Standing to Challenge and Enforce Administrative Action*, 49 Col. L. Rev. 759, 770, 771 (1949); Shapiro, *Some*

Thoughts on Intervention Before Courts, Agencies and Arbitrators, 81 Harv. L. Rev. 721, 738-739, 744 (1967-68). In administrative proceedings, the device of participation by interested parties and interveners aids the agency in its fact-gathering function without binding the participant. The CAB Rules and Regulations, 14 C.F.R. §302.15 (a), provide that "any person whose intervention will be conducive to the ends of justice and will not unduly delay the conduct of such proceeding may be permitted to intervene." Intervention before administrative agencies is freely allowed whenever it will serve the "public interest" or whenever the party seeking to intervene may be bound as a practical matter, although *not* in a strict res judicata sense, by the order. *Textile Workers Union* v. *Allendale Co.*, 226 F.2d 765 (D.C. Cir. 1955), *cert. denied*, 351 U. S. 909 (1956); *United States* v. *Terminal R.R. Ass'n*, 236 U. S. 194 (1915); *U. A. W., Local 283* v. *Scofield*, 382 U. S. 205 (1965). By contrast, intervention before a court is strictly limited and, as a corollary, once intervention is allowed the intervener is usually bound by the judgment.

The CAB Rules make clear the distinction between the effect of intervention before the CAB as contrasted to intervention before a judicial forum. 14 C.F.R. §302.15 (d), *Effect of granting intervention*, provides:

> "A person permitted to intervene in a proceeding thereby becomes a party to the proceeding. However, interventions provided for in this section are for administrative purposes only, and no decision granting leave to intervene shall be deemed to constitute an expression by the Board that the intervening party has such a substantial interest in the order that is to be entered in the proceeding as will entitle it to judicial review of such order."

Despite the contrary purport of the Agency's own Regulations, the Court below argued that the same principle cited in §79 of the Restatement, applies to administrative proceedings (A21). As authority for this proposition it cited three cases which have nothing to do with intervention at all; rather, they deal with the principle of collateral estoppel between administrative agencies with overlapping jurisdiction. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 401-04 (1940); *United States* v. *Utah Construction & Mining Co.*, 384 U. S. 394, 421-22 (1966); *Safir* v. *Gibson*, 432 F.2d 137, 142-43 (2 Cir.), *cert. denied*, 400 U. S. 942 (1970). These cases stand for the proposition that a party in an administrative proceeding is collaterally estopped from relitigating the same factual issue before a sister agency. There was no intent or prospect of APA taking that course of action in the instant case.

The extent of the Circuit Court's error can be seen in the fact that, even in a judicial proceeding, appearance as a party by an intervener does not give a court power to bind that intervener by its judgment unless the court has jurisdiction over the subject matter as well. Thus, while the CAB has broad power to permit intervention under 14 C.F.R. §302.15 (a), *supra*, it can only bind by its orders those over whom it has statutory jurisdiction. The Federal Aviation Act, 49 U.S.C. §1302, defines the Board's jurisdiction in terms of its power over air carriers. Although 49 U.S.C. §1378 (b) gives the CAB incidental authority to impose labor protective provisions as a condition to permitting *carriers* to merge, those provisions are obligations of the carrier and nowhere appear to extend the jurisdiction of the Board. In recognition of its limited jurisdiction, the CAB's order directed American Airlines to arbitrate and did not by its terms purport to exercise authority

over APA or any other intervener. We do not believe the Circuit Court would rule that the CAB had the power to require the Port of New York Authority (one of the 26 interveners in this case) to extend the length of a runway because it had submitted itself to the Board's jurisdiction through its intervention. The CAB may have the power to prevent a merger if a condition is not fulfilled; it does not have the jurisdiction to make intervening parties comply with its directive to American Airlines. The Circuit Court's conclusion appears to have blurred the fundamental distinction between "appearance" which may give the Court or Board personal jurisdiction over the intervener and subject matter jurisdiction which is also a prerequisite to any binding judgment or order.

If the decision of the Circuit Court is not reversed, and APA is bound by a third-party arbitration as a result of its limited participation in the CAB proceeding, it will entirely deter APA and other interested parties from future Board proceedings for fear they may be bound by some unforeseen ruling. Since intervention in administrative proceedings aids the agency in fact-gathering and serves the "public interest", *supra*, at 27 of petition brief, such a result would have immeasurable adverse consequences. Without the help of interveners, administrative boards would be sorely curtailed in their fact-gathering capacity. As the Circuit Court's opinion avers, administrative agencies already suffer from a lack of time and money (A18) and it is certain that their effectiveness would be further impaired if the Court's opinion is allowed to stand. The Circuit Court erred in concluding that APA, as an intervener in an administrative proceeding, was bound by the CAB order directing American Airlines to arbitrate.

Conclusion

This petition arises directly from the orders of the Civil Aeronautics Board and their affirmance by the Court below. We believe that the importance of the issues raised as they affect the conduct of the CAB and the critical industry it administers is sufficient warrant for the grant of this petition; it would be the first time that this Court will have reviewed the implementation of the important Labor Protective Provisions applicable to airline mergers. However, these issues are of even broader scope than the single industry and agency. The issues broadly stated include: (a) the extent to which an Agency must consider policies developed under statutes other than the one it is administering, (b) the limits of an Agency's right to abandon its decision-making authority to non-governmental private third parties, and (c) the jurisdictional effect upon third parties of their presentation of views in administrative information gathering proceedings. The decisions below have already created precedents which we believe will affect the entire administrative process. We respectfully submit that those decisions are wrong and should not be permitted to stand long unanswered. For these and the foregoing reasons the petition for writ of certiorari should be granted

Respectfully submitted,

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APPENDIX

Statutes and Rules Involved

Administrative Procedure Act

5 U.S.C.

§556(b). Hearings—Presiding employees—

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

Federal Aviation Act

49 U.S.C.

§1302. Declaration of policy—Board.—In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve

the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics. (Aug. 23, 1958, P. L. 85-726, Title I, §102, 72 Stat. 740.)

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CIVIL AERONAUTICS BOARD—GENERAL POWERS OF BOARD

§1321. Continuation of existing Board.—(a) General.— (1) The Civil Aeronautics Board, created and established under the name "Civil Aeronautics Authority" by section 201 of the Civil Aeronautics Act of 1938 and redesignated as the "Civil Aeronautics Board" by Reorganization Plan No. IV of 1940 [5 §133t note], is hereby continued as an agency of the United States and shall continue to be composed of five members appointed by the President, by and with the advice and consent of the Senate, for terms of six years, beginning upon the expiration of the terms for which their predecessors were appointed, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall

be appointed only for the remainder of such term; but upon the expiration of his term of office a member shall continue to serve until his successor is appointed and shall have qualified.

(2) The members of the Board may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. No more than three of the members shall be appointed from the same political party. The President shall designate annually one of the members of the Board to serve as chairman and one of the members to serve as vice chairman, who shall act as chairman in the absence or incapacity of the chairman.

(b) Qualifications of members.—The members of the Board shall be appointed with due regard to their fitness for the efficient dispatch of the powers and duties vested in and imposed upon the Board by this Act. Each member of the Board shall be a citizen of the United States and no member of the Board shall have any pecuniary interest in or own any stock in or bonds of any civil aeronautics enterprise. No member of the Board shall engage in any other business, vocation, or employment.

(c) Quorum, principal office, and seal.—Three of the members shall constitute a quorum of the Board. The principal office of the Board shall be in the District of Columbia where its general sessions shall be held, but whenever the convenience of the public or of the parties may be promoted, or delay or expense may be prevented, the Board may hold hearings or other proceedings at any other place. The Board shall have an official seal which shall be judicially noticed and which shall be preserved in the custody

of the secretary of the Board. (Aug. 23, 1958, P. L. 85-726, Title II, §201, 72 Stat. 741; Aug. 14, 1964, P. L. 88-426, Title III, §305(16)(A), 78 Stat. 424.)

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§1355. **Delegation of powers and duties to private persons.**—**(a) Delegation by Administrator.**—In exercising the powers and duties vested in him by this Act, the Administrator may, subject to such regulations, supervision, and review as he may prescribe, delegate to any properly qualified private person, or to any employee or employees under the supervision of such person, any work, business, or function respecting (1) the examination, inspection, and testing necessary to the issuance of certificates under title VI of this Act [§§1421-1430 of this title], and (2) the issuance of such certificates in accordance with standards established by him. The Administrator may establish the maximum fees which such private persons may charge for their services and may rescind any delegation made by him pursuant to this subsection at any time and for any reason which he deems appropriate.

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§1371. **Certificate of public convenience and necessity.**

(k) Compliance with labor legislation.

(4) It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended [45 §§181-188].

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§1378. Consolidation, merger, and acquisition of control.—

(b) Power of Board.—Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: Provided, That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: Provided, further, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier, or affiliated therewith within the meaning of section 5(8) of the Interstate Commerce Act, as amended [§5(8) of this title], such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of ap-

proval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition: Provided further, That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

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§1486. **Judicial review of orders.**—(a) **Orders of Board and Administrator subject to review.**—Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act [§1461 of this title], shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Judiciary and Judicial Procedure Act

28 U.S.C.

§1254. Courts of appeals—Certiorari—Appeal—Certified questions.—Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Railway Labor Act

45 U.S.C.

§151a. General purposes.—The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (May 20, 1926, c. 347, Title I, §2, in part, 44 Stat. 577; June 21, 1934, c. 691, §2, in part, 48 Stat. 1186.)

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§152. General duties.—First. Duty of carriers and employees to settle disputes.

Fourth. Organization and collective bargaining—Freedom from interference by carrier—Assistance in organizing or maintaining organization by carrier forbidden—Deduction of dues from wages forbidden. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Civil Aeronautics Board Rules and Regulations

14 C.F.R.

§302.15. Formal intervention in hearing cases.

(a) *Who may intervene.* Petitions for leave to intervene as a party will be entertained only in those cases that are to be decided upon an evidentiary record after notice and hearing. Any person who has a statutory right to be made a party to such proceeding shall be permitted to intervene. Any person whose intervention will be conducive to the ends of justice and will not unduly delay the conduct of such proceeding may be permitted to intervene. The Board does not grant formal intervention, as such, in nonhearing matters, and any interested person may file documents authorized under this part without first obtaining leave.

(d) *Effect of granting intervention.* A person permitted to intervene in a proceeding thereby becomes a party to the proceeding. However, interventions provided for in this section are for administrative purposes only, and no decision granting leave to intervene shall be deemed to constitute an expression by the Board that the intervening party has such a substantial interest in the order that is to be entered in the proceeding as will entitle it to judicial review of such order.

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§302.27. Delegation to examiners and action by examiners after hearing.

(a) *Delegation of authority to make the agency decision subject to discretionary review.* Pursuant to the authority conferred on the Board and the Chairman of the Board by

Reorganization Plan No. 3 of 1961, 26 F.R. 5989, there is hereby delegated to each hearing examiner assigned to a particular case subject to this part the Board's function of making the agency decision on the substantive and procedural issues remaining for disposition at the close of the hearing in such case, except that this delegation does not apply in cases where the record is certified to the Board, with or without a recommended decision by the examiner, or in cases requiring Presidential approval under section 801 of the Act. This delegation does not apply to the review of rulings by the examiner on interlocutory matters which have been appealed to the Board in accordance with the requirements of §302.18. The term "initial decision," as used in this part, shall encompass the examiner's decision pursuant to this delegation of authority on the merits of the proceeding and on all ancillary procedural issues remaining for disposition at the close of the hearing.

Federal Register Documents

26 F.R.

§1(a) Presidential Documents.—Title 3—The President. —Reorganization Plan No. 3 of 1961.—Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, May 3, 1961, pursuant to the provisions of the Reorganization Act of 1949, as amended.

CIVIL AERONAUTICS BOARD

SECTION 1. *Authority to delegate.* (a) In addition to its existing authority, the Civil Aeronautics Board, hereinafter referred to as the "Board", shall have the authority to delegate, by published order or rule, any of its functions to a division of the Board, an individual Board mem-

ber, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business, or matter: *Provided, however,* That nothing herein contained shall be deemed to supersede the provisions of section 7(a) of the Administrative Procedure Act (60 Stat. 241), as amended.

Court of Appeals Order Denying Petitions to Review CAB Orders Nos. 71-6-71 and 71-6-30

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1083—September Term, 1970.

(Argued July 14, 1971 Decided July 22, 1971.)

Docket No. 71-1011

AMERICAN AIRLINES, INC.,

Petitioner,

—and—

ALLIED PILOTS ASSOCIATION,

Intervenor-Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,

Respondent,

—and—

MASTER EXECUTIVE COUNCIL OF THE PILOTS OF TRANS CARIBBEAN AIRWAYS,

Intervenor-Respondent.

Before:

FRIENDLY, *Chief Judge,*
LUMBARD and OAKES, *Circuit Judges.*

FRIENDLY, *Chief Judge:*

Every airline merger presents difficult human and financial problems of the relative privileges of the employees

of the two carriers. Knowing that such problems would arise in the merger of Trans Caribbean Airways, Inc., (TCA) into American Airlines, Inc., which, indeed, had already been aired at the hearings, the Civil Aeronautics Board in its order of approval, effective December 31, 1970, announced that it would impose the labor protective provisions adopted in the *United-Capital Merger Case*, 33 CAB 307 (1961), which it had uniformly applied in every subsequent merger and route transfer case. Among these conditions, 33 CAB at 342-47, were the following:

> Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.
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> Section 13. In the event that any dispute or controversy (except as to matters arising under sec. 9) arises with respect to the protection provided herein, which cannot be settled by the carrier and the employee, or his authorized representative, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, etc., shall be agreed upon by the carriers and the employees, or the duly authorized representatives of the employees.

The merger was consummated on March 8, 1971.

Prior to that date the Master Executive Council of the pilots of TCA (TCA-MEC) filed a petition asking the Board to direct American, Allied Pilots Association (APA) (the bargaining agent for American's pilots), and itself to submit the integration of the pilot seniority list to final and binding arbitration. Answers were filed by American, APA, and the Flight Engineers International Association (FEIA) representing American's flight engineers.[1] Later submissions revealed that on February 4, 1971, American and APA had entered into a memorandum of understanding on seniority list integration, which provided for signature on behalf of the TCA pilots but had not been signed by them. The TCA pilots considered unacceptable certain aspects of the proposed integration of the pilots still in service on a date-of-hire basis and, even more so, a provision with respect to the recall of furloughed pilots on the basis of "last furloughed, first recalled." TCA-MEC claimed that the practical effect of the latter provision would be that all American's pilots furloughed as of the date of the merger would be recalled before any of TCA's furloughed pilots. It contended also that the proposed method of integration was simply an adoption by American of proposals made by APA and that the latter had "resolutely refused to adopt any procedures leading to a fixed period of negotiation, to be followed by arbitration failing a negotiated settlement." APA and American opposed the petition, asserting that integration had already been accomplished "on a fair and equitable basis." In an order dated May 7, 1971, the Board noted its "long standing policy" that matters encompassed in labor protective conditions of a

1. The International Brotherhood of Teamsters also submitted a pleading in support of Board action to ensure the propriety of seniority integration procedures.

merger "should be resolved by voluntary agreement between the carrier and the labor groups or employees involved, or, failing agreement, by arbitration"; judicial recognition "that the Board lacks expertise in labor matters and that seniority is basically a matter for negotiation or arbitration," see *Outland* v. *CAB,* 284 F.2d 224, 228 (D.C. Cir. 1960) (Burger, *J.*); and other judicial statements that, under the Inter-State Commerce Commission's Labor protective provisions similar to those here imposed, either party has " 'the absolute right to select arbitration as a means for settling the dispute and when such selection [is] made the arbitration [is] mandatory upon the other party,' " quoting from *New Orleans & Ne. Ry.* v. *Bozeman,* 312 F.2d 264, 267 (5 Cir. 1963); *Brotherhood of Locomotive Engineers* v. *Chicago & Nw. Ry.,* 314 F.2d 424, 433 (8 Cir.), *cert. denied,* 375 U.S. 819 (1963). Accordingly, it directed "[t]hat American shall within 30 days submit all pending disputes with respect to the seniority list integration of the American and TCA pilots and flight engineers to a neutral arbitrator or committee of arbitrators."

On May 28, 1971, American filed with the Board a petition for reconsideration. It annexed to this a letter from APA advising American of the union's position that no arbitration could change or vary the agreements already reached between American and APA and asking American to "[b]e assured that the pilots in the employ of American Airlines, as represented by the Allied Pilots Association, will use every means available to protect and insure the Company's compliance with our Collective Bargaining Agreement." Pointing to the dangers of labor strife implicit in the APA letter and alleging various difficulties in proceeding with the arbitration in the face of APA's announced refusal to participate, American asked that the

Board "appoint a hearing examiner to determine whether the Memorandum of Understanding dated February 4, 1971 between American and the Allied Pilots Association provides a fair and equitable method of seniority integration and, if not, to prescribe the manner in which disputes concerning the method of integration should be resolved." In support of this proposal, it cited the Board's attempt to resolve a seniority dispute by itself establishing a list in the *North Atlantic Route Transfer Case,* 12 CAB 422 (1951), aff'd sub nom. *Kent* v. *CAB,* 204 F.2d 263 (2 Cir.), *cert. denied,* 346 U.S. 826 (1953).

TCA-MEC responded that while it saw no reason justifying reconsideration, "as still another good faith effort at accommodating the dispute, it had no objection to the appointment of a hearing examiner for the same purpose as in the *Kent* case—namely, the creation of an integrated seniority list." On the other hand, it vigorously objected to proceeding as American had proposed, namely, first considering whether the arrangement already worked out between American and APA was fair and equitable and, if and only to the extent that this was decided in the negative, prescribing still further procedures for resolving remaining issues.

APA also filed an answer which was labeled as in "support" of American's petition for reconsideration. It conceded the Board's power to determine whether the existing arrangement was "fair and equitable," but challenged the Board's authority to permit an arbitrator to order a departure from an agreement between a surviving carrier and the collective bargaining representative of its employees, and was conspicuously silent on whether the Board itself could do this—as distinguished from merely directing the dominant carrier and its union to try again.

On June 11, 1971, the Board denied reconsideration. It reiterated that it did "not consider it appropriate to entertain this dispute beyond directing compliance with the labor protective conditions imposed as a condition to our approval of the merger." It found "no basis for assuming that the legal effect of an integration of the seniority lists by arbitration would be any different from that which would result from integration by the Board after what would undoubtedly be protracted evidentiary and other proceedings." Further, while the Board expressed the "hope" that APA would take part in the arbitration proceeding, it concluded that "[i]f [APA] chooses not to do so, and the decision of the arbitral tribunal should be considered by it to be adverse to its interests, it would have no basis for complaint." Also, it rejected American's claims with respect to the difficulties of the arbitration, and emphasized that the question was not whether the American-APA plan fell within the range of what was "fair and equitable" but rather, since full agreement had not been reached, what plan of integration the arbitral tribunal determined to be most appropriate. It directed American to proceed to arbitration within ten days. American promptly filed this petition to review. Upon its representation that the Board was steering a collision course which entailed a serious risk of a strike on a major air carrier, we granted a stay, conditioned on an expedited appeal—a procedure which we are being compelled to employ with alarming frequency.[2]

2. In many such cases, although not in this one, the briefs on such expedited appeals are inadequate. And the need for speedy decision tends against the "ample time and freshness of mind for private study and reflection in preparation for discussion" and the writing of helpful opinions, about which Mr. Justice Frankfurter spoke so eloquently in his dissent in *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 458-59 (1959).

At first blush it would seem indeed, as it did to the panel that granted the stay, that for an administrative agency to decline to follow a procedure, admittedly fair and within its power, which was affirmatively urged by a carrier, reluctantly acquiesced in by the labor organization that might have been expected to object, and not opposed by its rival, was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). However, that would be too much of a keyhole view. Congress has vested the Board with the power to approve airline mergers "upon such terms and conditions as it shall find to be just and reasonable. * * *" 49 U.S.C. §1378(b). The broad scope of a similar provision in the Interstate Commerce Act was recognized by the Supreme Court many years ago. *United States* v. *Lowden,* 308 U.S. 225 (1939). If the Board's experience convinced it that the integration of seniority lists of employees of merging carriers was a function which it was not well suited to perform and which, in the absence of agreement, had best be left to arbitration, that was a judgment it was competent to make. The Board, like other agencies, operates on a limited budget, both of money and of time; it may properly decide that these scarce resources should be husbanded for the tasks for which it considers itself to be expert, rather than frittered away in an area more suitable for an experienced labor arbitrator. It is no matter that the policy announced in the *United-Capital* case represented a change from the course pursued in the *North Atlantic Route Transfer* case. As Judge Prettyman so wisely said, an agency's "view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and ex-

perience often dictates change." *Pinellas Broadcasting Co.* v. *FCC*, 230 F.2d 204, 206 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956). It is far too late after the many decisions, including the two cited by the Board, that have recognized the validity of arbitrators' decisions on seniority issues under the standard protective provisions imposed both by the Board and by the I.C.C., to argue successfully that prescribing an arbitration procedure for integrating seniority lists if negotiation fails is a delegation outlawed by 5 U.S.C. §555(b). In any event, the time for challenging the legality of that provision in the order of December 31, 1970, had expired before the filing of this action. 49 U.S.C. §1486(a).

Once the Board had made the determination that arbitration was the appropriate method of integrating seniority lists in cases in which the parties could not reach an agreement by negotiation, it was for it to decide, within the range of reason, whether the circumstances of this case dictated an exception to the general rule. Surely it was not irrational for the Board to rule that the dissatisfaction of and threats by an intransigent union and the acquiescence of a fearful employer were not a sufficient ground. To yield in one such case would be to invite repetition and thereby undermine a policy the Board had a right to establish. Moreover, we agree with the Board that American's fears with respect to the conduct of the arbitration are exaggerated. The airline refers to the difficulties it will have in finding an arbitrator when one of the most important parties refuses—or at least says it will refuse—to participate in the selection. The Board answers that the National Mediation Board, whose duties under the Railway Labor Act have made it familiar with airline

labor disputes, can supply one whose fairness and qualifications could hardly be challenged.[3] American claims to be worried over the lack of standards the arbitrator is to follow. He must apply the same standard, "the integration of seniority lists in a fair and equitable manner," by which an examiner of the Board would be bound. American professes concern with respect to the number of employee groups the arbitrator may have to hear; the same problem would occur before a hearing examiner. The contention that the arbitrator cannot lawfully alter the contract between American and APA is answered by what Judge Chase wrote for this court in *Kent, supra,* 204 F.2d at 266:

> A private contract must yield to the paramount power of the Board to perform its duties under the statute creating it to approve mergers and transfers of certificates, such as are here involved, only upon such terms as it determines to be just and reasonable in the public interest.

What the Board can do, an arbitrator appointed pursuant to its order can likewise do.

American's real fear is that, despite all this, APA will refuse to recognize the decision of an arbitrator which it does not like. But APA could do this only at serious peril. Paragraph 5 of the Board's order of May 7, 1971, prescribes

> [t]hat the determination of the arbitral tribunal shall be final and binding upon all pilots and flight engineers

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3. APA's statement at argument that the country possesses only one labor arbitrator competent to integrate airline seniority lists and that APA cannot accept him because of his relations with the Air Line Pilots Association—of which it believes TCA-MEC to be a subdivision—verges on the absurd. While we entertain the highest respect for this gentleman, we are sure he would be the last to make any such assertion of indispensability.

of American Airlines as to which there exists a dispute with respect to seniority list integration, which has been the subject of the arbitration provisions provided for herein.

Refusal by APA to abide by the arbitral determination, in this case unless it has been challenged on a recognized ground, cf. 9 U.S.C. §10, would be as much a contempt as refusal to abide by an integration of the seniority lists made by the Board itself. As already indicated, the Board has broad powers under 49 U.S.C. 1378(b) to deal with labor relation problems growing out of airline mergers. See *Kent* v. *CAB, supra.* No argument has been made to us that suggests that while the Board has power to order arbitration of unresolved seniority lists integration questions, it cannot bind *all* relevant parties by the determination of the arbitral tribunal. To say that the Board could direct an arbitral resolution but not make that resolution binding on all concerned parties would leave the Board with powers that would be more apparent than real. However, we need not here depend on so general a principle, for APA —as well as all other concerned parties—took an active part in the proceedings which resulted in the issuance of the Board's order of May 7, 1971. As said in the ALI Restatement of Judgments, §79, p. 356 (1942), "A person who intervenes as a contestant in a proceeding is a party to the judgment whether or not the court originally had jurisdiction over him, provided that before the judgment is finally rendered he appears as a party." Cf. *Rudolph* v. *City Manager of Cambridge,* 341 Mass. 31, 167 N.E.2d 151, 157 (1960). The same principle applies to one who has become a party to a proceeding before an administrative agency. Cf. *Sunshine Anthracite Coal Co.* v. *Adkins,*

310 U.S. 381, 401-04 (1940); *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966); *Safir* v. *Gibson*, 432 F.2d 137, 142-43 (2 Cir.) *cert. denied*, 400 U.S. 942 (1970). The mere possibility of unlawful conduct by APA is surely not enough to make the Board's adherence to its established policy "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).

The petitions for review are denied. The stay will be vacated on a date five days after the entry of this opinion.

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of July, one thousand nine hundred and seventy-one.

Present:

Hon. HENRY J. FRIENDLY,
Chief Judge,
Hon. J. EDWARD LUMBARD,
Hon. JAMES L. OAKES,
Circuit Judges.

AMERICAN AIRLINES INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

MASTER EXECUTIVE COUNCIL, etc., and
ALLIED PILOTS ASSOCIATION,

Intervenors.

A petition for review of orders of the Civil Aeronautics Board.

This case came on to be heard upon a stipulation that neither a record or a certified list of items comprising the record need be filed and was argued by counsel.

On consideration thereof, it is now hereby ordered, adjudged and decreed that the petition be and it hereby is denied with costs to be taxed against the petitioners.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

A true copy,

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

[SEAL]

Board Order No. 71-6-71 Denying Petition for Reconsideration

Order 71-6-71

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 11th day of June, 1971

Docket 21828

AMERICAN-TRANS CARIBBEAN MERGER CASE

By Order 71-5-30, May 7, 1971, the Board directed American Airlines to submit within 30 days, for final and binding arbitration, all pending disputes with respect to the seniority list integration of American and TCA pilots and flight engineers. By petition filed May 28, American seeks reconsideration of that order. An answer to American's petition has been filed by the former TCA pilots.

Attached to American's petition is a letter from the Allied Pilots Association (APA), representing American's pilots,[1] stating that APA adheres to its views that the Board does not have authority to direct arbitration, and contending that no such arbitration proceedings can affect its alleged contracts with American with respect to senior-

1. APA filed an answer in support of American's petition.

ity rights. American takes the position that in view of the failure of agreement of one of the interested parties to third-party arbitration of the seniority list dispute, that the arbitration procedure directed by the Board is not feasible, and that the Board should appoint a hearing examiner to determine the proper disposition of this matter as it did in the *North Atlantic Route Transfer Case,* 14 C.A.B. 910 (1951), aff'd *Kent* v. *C.A.B.,* 204 F.2d 263 (2nd Cir., 1953). The former TCA pilots, while asserting a lack of merit in American's petition, nonetheless do not oppose a resolution of the dispute by the Board.

American's petition will be denied. All matters presented by American in its reconsideration petition were fully considered by the Board in reaching its determinations set forth in Order 71-5-30.

The Board does not consider it appropriate to entertain this dispute beyond directing compliance with the labor protective conditions imposed as a condition to our approval of the merger. As noted in Order 71-5-30, seniority list disputes are more appropriately resolved by arbitration than by the Board.[2] Furthermore, there is no basis for assuming that the legal effect of an integration of the seniority lists by arbitration would be any different from that which would result from integration by the Board after what would undoubtedly be protracted evidentiary and other proceedings. In either case, any alteration of rights allegedly derived from the collective bargaining agreement would flow from the labor protective conditions imposed upon the merger and, as held in *Kent* v. *C.A.B., supra,* "[a] private contract must yield to the paramount

2. Specifically, we find no merit to APA's contentions that arbitration is an inappropriate means for resolving seniority integration disputes.

power of the Board to perform its duties under the statute creating it to approve mergers and transfers of certificates * * * only upon such terms as it determines to be just and reasonable in the public interest."[3]

If American or APA are of the view that the labor protective conditions, or our Order 71-5-30 directing compliance with those conditions, are illegal or incapable of performance because of any barrier created by American's contract with APA, the appropriate remedy is to seek judicial review of the Board's orders. We wish to make it clear, however, that the Board would not consider the pendency of any such review proceedings as grounds for postponing the implementation of its directive for arbitration.

The failure of APA to agree to, or the possibility of its refusal to cooperate in connection with arbitration, does not provide any basis for reconsideration of the Board's order. The order specifically provided for protection of APA rights in the event of such a contingency.[4] All groups of pilots or flight engineers desiring to participate in such arbitration proceedings were afforded the opportunity to

3. 204 F.2d at 266. Section 414 of the Act provides that "any person affected by any order made under section[s] 408 * * * of this Act shall be, and is hereby, relieved from * * * all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

4. We reject the contention that the order is deficient because it fails to specify the parties that will be bound by the arbitral decision. Ordering paragraph 5 provided, "That the determination of the arbitral tribunal shall be final and binding upon all pilots and flight engineers of American Airlines as to which there exists a dispute with respect to seniority list integration, which has been the subject of the arbitration proceedings provided for herein"; and accordingly the determination of the arbitral tribunal would similarly be binding on any and all representatves of such employer.

do so, through representatives of their own choosing. In the event APA, as the chosen representative of one of the interested groups of employees, should choose not to avail itself of this opportunity, American was directed to adopt procedures which would "insure, to the maximum feasible extent under the circumstances, that the determination rendered by the arbitral tribunal shall fully consider the interests of such employees." We would hope that APA would cooperate and participate in the arbitral proceedings which we have prescribed. If it chooses not to do so, and the decision of the arbitral tribunal should be considered by it to be adverse to its interests, it would have no basis for complaint.

American further urges that reconsideration is warranted because the Board's order fails to sufficiently spell out the specific arbitral procedures to be adopted. We do not agree. There is no reason to believe that there would be any difficulty in agreement upon arbitral procedures by those interested parties who are willing to cooperate in connection with the arbitral proceedings. In the event of failure of such cooperation by any interested party, our order imposes upon American the obligation to adopt such procedures as will provide the maximum fairness to all concerned under the circumstances. We are unpersuaded that any serious difficulty would be encountered by American in meeting this obligation.[5] Should any party fail to cooperate in connection with adoption of appropriate arbitral procedures, it will have no basis for complaint with

5. In this connection, it may be noted that the services of the National Mediation Board may always be invoked for designation of a neutral and impartial arbitrator.

respect to any reasonably fair procedures which are utilized.[6]

Finally, we take note of American's and APA's implication that an appropriate question for arbitration might be whether the seniority integration plan imposed on the TCA pilots pursuant to the understanding between American and APA was "fair and equitable." We wish to make it absolutely clear, as our previous order stated, that the TCA pilots are not required to accept the American-APA proposal, but rather the TCA pilots have a right to arbitrate the question whether a different or alternative plan for seniority list integration may be more appropriate. There may be many alternative seniority list integration plans which could be considered "fair and equitable." Any such plans may be agreed to in negotiations. However, upon failure of agreement by negotiation, the entire question of the appropriate method of seniority list integration is to be submitted to final and binding arbitration, and the arbitral tribunal is not to be limited or restricted in any way to the question whether a particular proposed plan is "fair and equitable." Any party may, of course, submit any matters it desires to the arbitral tribunal in favor of any particular plan it proposes.

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6. We find no merit to the contention that a problem exists with regard to representation of the various groups of employees. Our previous order provided that all groups of pilots or flight engineers would be entitled to participate with "representation [*i.e.*, a representative or representatives] of their own choosing." As the TCA pilots point out, the Board has not considered that representation for purposes of its labor protective provisions would necessarily be the same as the certified bargaining representative under the Railway Labor Act. See Braniff—Mid-Continent Merger Case, 17 C.A.B. 19, 21-22 (1953). Accordingly, we reject APA's contentions to this effect. Indeed, the suggestion that the majority pilot group should, with the consent of the carrier, be in a position to impose its will upon the minority group is wholly contrary to the objectives of our labor protective conditions.

American has also requested that the Board's directives to submit the dispute to arbitration, within 30 days, and to file reports with respect thereto, be stayed. That request is denied. Further, in the absence of extraordinary circumstances, the Board will not entertain any further requests for delay in compliance with the Board's directives. Rather, we shall direct American to promptly meet with interested parties; to submit the seniority list dispute to arbitration at the earliest practicable date not later than 10 days after the date of service of this order, and to report with respect to such submission within 15 days of the date of service of this order. Subsequent weekly reports will also be provided for in order to facilitate the Board's monitoring of American's compliance with the Board's directives.

ACCORDINGLY, IT IS ORDERED:

1. That American shall promptly meet with all parties expressing an interest in the arbitral proceedings directed by Order 71-5-30, and shall agree upon, or, in accordance with the views expressed herein, arrive at, appropriate and fair procedures for pursuance of such arbitration; and shall submit the seniority list integration dispute to arbitration, in accordance with the directives of this order and Order 71-5-30, at the earliest practicable date, and in any event not later than 10 days from the date of service of this order.

2. That American shall (1) within 15 days after the date of service of this order file in the Docket of this proceeding a report setting forth the manner in which it has submitted the disputes to arbitration and any guidelines

established to govern the proceeding; and (2) submit a report weekly thereafter stating the progress of such arbitral proceeding, such reports to be submitted until such time as hearings on the merits of the seniority list dispute are actually commenced before an arbitrator or arbitrators, as the case may be.

3. Except to the extent inconsistent herewith, the provisions of Order 71-5-30 shall remain in full force and effect; and the petition for reconsideration filed by American Airlines, Inc., and all other requests in this proceeding to the extent inconsistent herewith, be and they hereby are denied.

By the Civil Aeronautics Board:

HARRY J. ZINK
Secretary

(SEAL)

Board Order No. 71-5-30 Requiring American to Arbitrate All Seniority List Disputes

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 7th day of May, 1971

Docket 21828

AMERICAN-TRANS CARIBBEAN MERGER CASE

ORDER

By Order 70-12-161, served December 31, 1970, the Board approved the merger of Trans Caribbean Airways, Inc. into American Airlines, Inc., subject to the labor protective conditions established by the Board in the *United-Capital Merger Case,* 33 C.A.B. 307 (1961). In the same order, the Board denied, without prejudice, a petition filed by the Master Executive Council of the pilots of Trans Caribbean Airways that the Board take certain actions concerning the integration of the pilot seniority lists of the merging carriers.

On February 2, 1971, the Master Executive Council of the pilots of Trans Caribbean Airways (TCA-MEC) filed a petition with the Board requesting that the Board direct American Airlines, the Allied Pilots Association (the certi-

fied bargaining agent for the flight personnel of American) and TCA-MEC to submit the matter of integration of the pilot seniority list to final and binding arbitration. The petition also requested that the Board direct American Airlines to provide interim protection for the TCA pilots until an integrated seniority list resulted from either negotiation or arbitration. Answers to the petition were received from American Airlines, the Allied Pilots Association (APA), and the Flight Engineers International Association representing American flight engineers.[1] On February 24, 1971, the General Counsel of the Board requested further submissions from the parties on various points. These have been received.

The merger of Trans Caribbean into American was effectuated on March 8, 1971. The pleadings disclose that the TCA pilots active on that date were integrated into the American Airlines pilot seniority list on a straight date of hire basis and were awarded the flying opportunities to which their respective positions on the merged seniority list entitled them; and that American proposes to recall all its furloughed pilots, including those formerly employed by Trans Caribbean, on a basis of last furloughed-first recalled. TCA-MEC takes the position that this method is unfair and inequitable to the active pilots because it results in the downgrading of numerous pilots to lower level positions.[2] It asserts that, contrary to the claims of American and APA, past merger integrations reveal that date-of-hire

1. The International Brotherhood of Teamsters also filed a pleading generally supporting Board action to assure appropriate seniority integration procedures.

2. For example, the petitioner alleges that of 19 TCA DC-8 captains, 11 will be "downgraded" to B-727 captains and 8 to BAC-111 captains.

integration is the exception, not the rule. Further, under the proposed method for recall of the furloughed pilots, all American's furloughed pilots would be recalled before any TCA pilots. TCA-MEC alleges that virtually all the TCA pilots have a date of hire earlier than the American pilots, and, apart from other considerations, there is no basis for integrating the active pilots on a date of hire basis and employing a different basis for recall of the furloughed pilots.[3] TCA-MEC alleges that, despite requests to do so, APA "has resolutely refused to adopt any procedures leading to a fixed period of negotiation, to be followed by arbitration failing a negotiated settlement." Furthermore, the plan implemented by American Airlines on the effective date of the merger was for all intents and purposes identical to that proposed by APA and subsequently rejected by TCA-MEC.

APA urges denial of the petition, asserting "that the integration of seniority lists for the two pilot groups has already been accomplished on a fair and equitable basis in full compliance with the Board's orders and policies." The date-of-hire concept, it contends, is consistent with long-standing American policy and is the basic premise in prior seniority determinations, including those made by the

3. As part of their reply to the General Counsel's letter, the three parties submitted lists of the order of recall for furloughed pilots using both a date-of-hire and length-of-active-service basis. The lists reveal that on a date-of-hire basis, the first 75 pilots recalled would be former TCA personnel, followed by 20 American pilots, three TCA, and the last 114 would be American furloughs. On the length-of-active service listing most favorable to the American pilots, numbers 1-48 would be TCA, 49-67 American, 68-83 TCA, 84-199 with a single exception American, and 200-212 TCA. On the last furloughed-first recalled basis, the first 134 pilots recalled would be from American while the final 78 would be from TCA.

Board.[4] Furthermore, APA states that earnings of a former TCA pilot flying for American from the New York base will be higher than his former TCA earnings.[5] Concerning furloughed pilots, APA states that it is simply proposing the basic contract principle of last furloughed-first recalled. In addition, it asserts that most of the TCA furloughs were the result of reduced MAC contract flying and in view of TCA's financial condition at the time of the furloughs there was no prospect that the furloughed pilots would be recalled at all. Finally, APA asserts that the Board lacks regulatory authority over the affected labor organizations and that it cannot delegate its authority to integrate the seniority lists to private non-governmental arbitrators.

American Airlines also urges denial of the petition. It takes the position that the pilots employed by TCA became American employees on the date of the merger, and that the proposed treatment of the TCA pilots will give them a number of advantages over their TCA employment. The carrier argues that integrating the seniority lists for active pilots on a "date-of-hire" basis is appropriate because it preserves, as far as possible the reasonable expectations of both pilot groups. Although conceding there will be some "downgrading" as a result of the merger, American asserts that such downgrading is the inevitable result of integrating seniority lists and adding the former TCA pilots to the

4. APA also contends an advantage is being given to flight engineers formerly serving with TCA. These individuals are being allowed to integrate in the flight engineers seniority list on American and will thus be able to have preferential right over American pilots to the third seat in the cockpit. The FEIA takes a similar position, noting that 10 of the 12 TCA flight engineers have agreed to the proposed flight engineers seniority list integration.

5. TCA-MEC asserts that this contention is inaccurate. Rather, it is asserted that flight slots resulting from the merger will produce a windfall to American pilots.

American list will also downgrade a number of American pilots. Concerning the furloughed pilots, American argues that the policy of most recently furloughed being recalled first is normal practice of the entire industry and does not unjustly discriminate against former TCA personnel. It asserts that recalling furloughed pilots on either "date-of-hire" or "length-of-service" basis would deprive American's furloughed pilots of their reasonable expectations while exceeding those of TCA's furloughed pilots.

Although American opposes grant of the petition, noting particularly that Board integration of the seniority lists would be a lengthy and involved procedure, the carrier nevertheless believes that it would be lawful for the Board to order binding arbitration of questions relating to integration of seniority lists and the recall order of pilots.

Upon consideration of the matters presented, the Board has concluded that it is appropriate to issue an order directing American to submit the dispute with respect to seniority list integration to final and binding arbitration. On the other hand, we have concluded that, except to the extent indicated hereafter, the petitioner's request for interim relief should be denied.[6]

Although the Board customarily imposes labor protective conditions in merger cases, it has been the Board's long standing policy that the matters encompassed therein should be resolved by voluntary agreement between the

6. TCA-MEC had requested the Board to order American Airlines to retain all active former Trans Caribbean pilots and former Trans Caribbean equipment on the Caribbean or in TCA originating MAC charter operations until the seniority list dispute is settled. All the pilots, however, submitted bids to American and are being actively employed by American, albeit in positions they may regard as inferior to which they are entitled.

carrier and the labor groups or employees involved, or, failing agreement, by arbitration.[7] This policy with respect to seniority integration is reflected in sections 3 and 13 of the labor protective conditions.[8] Furthermore, the courts have heretofore recognized both the policy and the predicates upon which it rests—that the Board lacks expertise in labor matters and that seniority is basically a matter for negotiation or arbitration. See *Outland* v. *C.A.B.*, 284 F.2d 224 (D.C. Cir. 1960); *O'Donnell* v. *Pan American World Airways*, 200 F.2d 929, 932 (2d Cir. 1953). Also, in interpreting labor protective conditions imposed by the Interstate Commerce Commission which are virtually identical to section 13 of the *United-Capital* provisions, the courts have stated that the provisions give "either party the absolute right to select arbitration as a means for settling the dispute and when such selection [is] made the arbitration [is] mandatory upon the other party."[9] The clear import of

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7. See Braniff-Mid-Continent Merger Case, 15 C.A.B. 708, 717 (1952); South Pacific-Pan American Route Transfer Case, Orders E-23681, May 13, 1966, E-25685, September 15, 1967; Airlift International, Inc. and The Slick Corporation, Orders E-25822, October 11, 1967, E-26933, June 18, 1968.

8. Sections 3 and 13 provide, in pertinent part, that "provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected"; that "in the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13"; and that "[i]n the event that any dispute or controversy * * * arises wtih respect to the protection provided herein, which cannot be settled by the carrier and the employee, or his authorized representative, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, etc., shall be agreed upon by the carrier and the employees, or the duly authorized representatives of the employees."

9. New Orleans & Northeastern Railway Co. v. Bozeman, 312 F.2d 264, 268 (5th Cir. 1963); Brotherhood of Locomotive Engineers v. Chicago & Northwestern Railway Co., 314 F.2d 424 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963).

these decisions is that any affected party has the right to arbitrate any bona fide dispute of a non-frivolous nature.

Such a dispute exists here. While American appears to have implemented a formula which it and APA consider "fair and equitable," TCA-MEC need not accept this formula. American apparently is unwilling to submit the matter to arbitration. While the duty to arbitrate well might have been enforced by the TCA pilots in judicial proceedings, the Board also has jurisdiction to enter orders to implement the labor protective conditions. In all the circumstances here present, the Board finds that it is appropriate to direct American to promptly proceed to arbitration. APA's contention that the Board lacks jurisdiction to impose an arbitral solution on a labor union is unpersuasive; our order is directed to American over which we have jurisdiction. In the exercise of that jurisdiction, the Board will act to protect the interests of all the affected employees by directing American to afford all interested labor groups the opportunity to participate in the formulation of the arbitral tribunal and in the subsequent proceedings.[10]

Finally, we are not persuaded that the circumstances here present warrant interim relief from the Board. It appears that the active pilots presently are being afforded seniority rights based on their date of hire. Even though the arbitral tribunal may conclude that there is a more satisfactory solution of the seniority list dispute, pending determination by that tribunal, it does not appear that the circumstances would create such irreparable injury to the active pilots as to warrant a grant from the Board of the

10. In this connection, we note that there may be a certain divergence of interest between the active and furloughed pilots of both American and TCA, and accordingly we would expect that all such groups of pilots or flight engineers would be entitled to have separate or additional representation in the event they so desire.

extraordinary interim relief requested. This is particularly true since the requested relief might impinge on the ability of American to efficiently conduct the operations of the merged carrier. While the equities of the American-APA proposals with respect to the furloughed TCA pilots appear much more questionable, any grant of interim relief by the Board might prejudice the ultimate solution by arbitration. Our determination in this respect is not intended to imply that the arbitral tribunal shall not be entitled to render any interim relief that may be considered necessary or appropriate by the arbitrator or arbitrators.

ACCORDINGLY, IT IS ORDERED:

1. That American shall within 30 days submit all pending disputes with respect to the seniority list integration of the American and TCA pilots and flight engineers to a neutral arbitrator or committee of arbitrators;

2. That all groups of pilots or flight engineers who desire to do so shall be entitled to participate in said arbitration proceeding, and shall be entitled to representation of their own choosing;

3. That the formation of the arbitral tribunal, its duties, procedure, expenses, etc., shall be agreed upon by American and the respective representatives of all groups of employees who desire to participate in said arbitral proceedings and who cooperate with respect thereto; and that failing such agreement American shall make such provisions as necessary to proceed with the arbitration in accordance with paragraph 4 below;

4. That in the event that any group of employees or their representative shall decline to participate in, or fail to cooperate with respect to, said arbitration procedures,

the procedures adopted shall be such as to insure, to the maximum feasible extent under the circumstances, that the determination rendered by the arbitral tribunal shall fully consider the interests of such employees;

5. That the determination of the arbitral tribunal shall be final and binding upon all pilot and flight engineers of American Airlines as to which there exists a dispute with respect to seniority list integration, which has been the subject of the arbitration proceedings provided for herein;

6. That American shall:

(1) Within 35 days after the date of service of this order, file in the docket of this proceeding a report setting forth the manner in which it has submitted the dispute to arbitration and any guidelines established to govern the proceeding;

(2) Upon the rendering of any arbiter's decision, file copies of such decision with the Board; and

(3) Promptly thereafter, file with the Board a report setting forth in detail the manner in which the arbitral award has been or will be implemented.

7. That the Board shall retain jurisdiction in the proceeding for the purpose of taking such further action as it may deem necessary or appropriate in the public interest; and

8. That, except to the extent granted, the petition of TCA-MEC and all other requests herein be and they hereby are denied.

By the Civil Aeronautics Board:

HARRY J. ZINK
Secretary

(SEAL)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-489 and 71-550

AMERICAN AIRLINES, INC.,
Petitioner,
and
ALLIED PILOTS ASSOCIATION,
Intervenor-Petitioner,
against
CIVIL AERONAUTICS BOARD,
Respondent,
and
MASTER EXECUTIVE COUNCIL OF THE PILOTS OF TRANS CARIBBEAN AIRWAYS,
Intervenor-Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION FOR THE RESPONDENT MASTER EXECUTIVE COUNCIL OF THE PILOTS OF TRANS CARIBBEAN AIRWAYS

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BRIEF IN OPPOSITION FOR THE RESPONDENT MASTER EXECUTIVE COUNCIL OF THE PILOTS OF TRANS CARIBBEAN AIRWAYS

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix of Petition in No. 71-489, page A12-A24)[1] is reported at

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[1] The numbered pages of the Appendix of the Petition in No. 71-489 are referred to hereinafter as App. A1, App. A2, etc.

445 F.2d 891. The findings and orders of the Civil Aeronautics Board (App. A25-A40) are not yet reported.

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board has the authority, in approving an airline merger under section 408(b) of the Federal Aviation Act, to impose labor protective conditions which assure to responsible employee groups the right to binding arbitration of seniority disputes arising out of the merger.

2. Whether the Board acted reasonably in ordering arbitration in this case.

3. Whether the Board in ordering such arbitration may bind an employee group which has actively participated in the Board proceedings leading to the issuance of the order.

STATUTES INVOLVED

Pertinent provisions of the Federal Aviation Act of 1958, as amended (the "Act"), the Administrative Procedure Act, the Railway Labor Act, the Reorganization Plan No. 3 of 1961, 26 F.R. 5989, and the Regulations of the Civil Aeronautics Board, are set forth in the Appendix to the Petition for Certiorari in No. 71-489, at pages A1-A11.

In addition, 45 U.S.C. 157, First (Sec. 7, First, of the Railway Labor Act) provides:

> "First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a

board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise."

STATEMENT

In lieu of a complete restatement of the factual background of the present controversy, Respondent Master Executive Council of the Pilots of Trans Caribbean Airways (TCA-MEC) accepts and endorses the statement thereof by Respondent Civil Aeronautics Board (Board) in its Brief in Opposition. There are, however, two points which require clarification.

First. The Petitions of American Airlines, Inc. (American) in No. 71-550 and of the Allied Pilots Association (APA) in No. 71-489 may create the impression that all three parties (American, APA and TCA-MEC) sought to have the Board, rather than an arbitrator, integrate the seniority lists. In fact, American did not propose a proceeding to integrate the seniority lists, but rather a proceeding to determine what *procedures* should be followed for resolving any outstanding disputes. Record 206a, p. 12.[2] This issue had already been decided in the order of the Board approving the merger, with arbitration chosen by the Board. TCA-MEC vigorously objected to American's proposal. Record 210a, p. 2. While TCA-MEC reluctantly indicated its willingness to have the Board itself integrate the seniority lists, this was done only after American had refused to comply with the arbitration condition it had voluntarily accepted, and after

[2] "Record" refers to the Joint Appendix filed by the parties in the court of appeals. The Joint Appendix has been filed with the Clerk of this Court.

American and APA had seemingly indicated a willingness to be bound by a Board integration. Record 210a, pp. 10, 11. Moreover, TCA-MEC's willingness was, in terms, predicated on the delays incident to "APA['s] . . . threat that it will refuse to arbitrate no matter what the Board says." Record 175a, p. 19.

Second. Although TCA-MEC does not propose here to recite or argue the facts relating to the merits of the seniority question, it must take vigorous exception to the statement in American's Petition (Pet. No. 71-550, 15) that "important concessions" were made by APA during the abortive negotiations. The facts are directly contrary —despite several concessions made by TCA-MEC, the APA adamantly adhered to its original position on the seniority issue throughout the negotiations.

REASONS FOR DENYING THE WRIT

Petitioners concede that the Board has power to impose protective labor conditions in airline merger cases, including conditions for the integration of seniority lists. In our view, and in the view of the Board and the Court below, the basic issue on the merits of this litigation is whether the Board's choice of binding arbitration as the means of integrating the seniority lists of two merging carriers in the absence of agreement, as opposed to integrating the lists itself, was permissible as a proper exercise of its discretion. The court below found that the Board's choice of arbitration was a proper exercise of discretion in the circumstances. In the light of the requirements of Rule 19, Petitioners' plea that this Court review that determination is not a sufficient basis for invocation of this Court's power of discretionary review.

1. *No significant questions concerning national labor policy are raised by the Board's procedures or by the Board's refusal to consider an agreement between two parties to a tripartite labor dispute.*

Petitioner APA argues (Pet. No. 71-489, 9) that the agreement between APA and American (APA-AA agreement), allegedly a valid collective bargaining agreement within the meaning of the Railway Labor Act, was unlawfully "ignored" by the Board.

Petitioner's entire argument is erroneously founded on the premise that the procedures established by the Board for negotiation, agreement, and arbitration between employee groups (plural) and the employer are or should be the same procedures as those provided in the Railway Labor Act.[3]

The Board's undisputed power to impose protective labor conditions derives from Section 408 of the Federal Aviation Act, 49 U.S.C. 1378, and not from the Railway Labor Act. Although, as we shall show, the Board's labor conditions are consistent with the national labor policy, the conditions make provision for negotiations between two or more employee groups (which usually have conflicting interests) and the employer, rather than bi-partite negotiations between employee representatives and the employer as contemplated in the typical case arising under Section 2, Fourth, of the Railway Labor Act.

The fact is, therefore, that no agreement with respect to the American and TCA Pilots has been reached which meets the requirements of Section 3 of the Board's protective conditions. The APA-AA agreement, whether or not it otherwise complies with the Railway Labor Act,

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[3] Section 2, Fourth, of the Railway Labor Act (45 U.S.C. 151a) provides for collective bargaining with the employer by representatives of the employees, and further provides "that the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act." Section 7 (45 U.S.C. 157) provides for arbitration of disputes which cannot be settled by conference, by the appropriate adjustment board, or through mediation.

has not been approved by the TCA Pilots, and thus is not in compliance with the Board's labor conditions. It is at best a proposal which failed. Moreover, the conduct of the petitioners surely discloses that the APA-AA agreement is a nullity. The "agreement"—or more accurately the proposal—was expressly drafted as a tripartite agreement and was tendered to the TCA-MEC for signature and acceptance. Under Petitioners' theory, this was an unnecessary gesture. In fact, of course, it was not. It was rather a recognition of their obligations under the Board's labor protective provisions.

It is also premature, and therefore erroneous, for Petitioner to say that the Board has "ignored" the APA-AA agreement. In the absence of the necessary tripartite agreement contemplated by the Board's conditions, the procedures provided by Sections 3 and 13 thereof call for arbitration of the dispute, at which time the merits of the seniority dispute will be considered. As the Board has clearly pointed out (App. A29), at that time the APA-AA agreement can be put forward as a proposed solution of the dispute. At that time the agreement presumably will receive such consideration as the merits of the proposal may warrant.

Thus, to put it bluntly, the two-party agreement is *irrelevant* at the present *procedural* stage of the dispute. It follows that the failure of the Board to give "weight" to the agreement was not adverse to or in conflict with the national labor policy, and that the lower court's decision upholding the Board's action does not raise questions warranting review by this court. On the contrary, the Board's action is consistent with national labor policy. As this court made clear in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964), national labor policy favors collective bargaining and arbitration. The Board's conditions are wholly consistent with this policy, and the

Petitioner's objections relate to minor procedural objections and red herrings introduced by Petitioner itself.[4]

It must be noted that Petitioner's objection (that the Board as a matter of law must itself resolve the dispute rather than compel arbitration) is trivial at best. In the absence of voluntary agreement to arbitrate, settlement of the dispute by the Board is just as compulsory as settlement by compulsory arbitration. Moreover, a charge that the Board failed to give weight to the two-way agreement *prior* to the consideration of the seniority dispute on its merits represents an objection merely to the question of *timing*, since the Board has said (App. A29) that the agreement *can* be considered by the arbitrator when the merits of the dispute are reached. Thus, consideration of the agreement has merely been deferred to a later stage, and no important question of national labor policy is involved.

2. *Contrary to Petitioner American's assertion, the viability of negotiations as a means of settling disputes in airline merger cases is not impaired by the decision below.*

Petitioner American argues (Pet. No. 71-550, 9-13) that the procedures adopted by the Board in this case and approved by the court below fail to reconcile the policies of the Federal Aviation Act and the Railway Labor Act, and therefore "pose a serious threat that non-governmental compulsory arbitration will supplant negotiation as the means by which virtually all seniority list integration disputes between all types of airline employ-

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[4] *McGuire* v. *Humble Oil and Refining Co.*, 355 F. 2d 352 (C.A. 2, 1966), cited by Petitioner APA (Pet. No. 71-489, 9), is not to the contrary. The merger there was not subject to the approval of a regulatory agency vested with authority to impose just and reasonable protective conditions as the circumstances may require. The question before the court in *McGuire* involved the construction of a pre-existing collective bargaining agreement in the light of national labor policy.

ees will be resolved in future merger cases." The argument is founded on the contention that the Board, before opting for compulsory settlement of the dispute, must first consider the collective bargaining agreement between the carrier and the majority representative of the employees.

American's argument, which tries to force the present case into the mold of the Railway Labor Act, fails to recognize that airline merger cases give rise to labor disputes which are unlike the typical case arising under that Act. Under the Railway Labor Act negotiation and agreement between the collective bargaining representative and the employer is a proven and sound method of resolving disputes. But in airline merger cases a seniority labor dispute is a tripartite dispute involving the surviving carrier and two formerly separate employee groups. The Board's standard labor protective conditions and its procedures in the present controversy properly recognize this important and practical consideration.

Contrary to the implication in the Petitions, the actions of the Board in the present case do not represent a departure from its past procedure—a procedure evolved from the consideration and disposition of numerous airline merger cases. The courts and the Board have both recognized in earlier cases that the procedures under the Railway Labor Act should not be routinely followed where two or more employee groups in a merger have conflicting interests. In *Braniff-Mid-Continent Merger Case*, 17 C.A.B. 19 (1953), the Board was confronted with an agreement between the carrier and the representative of one of the conflicting employee groups over the objections of the other group. The Board there held as follows (17 C.A.B., at 21-22):

> ". . . we interpret section 3 of the Board's order as requiring Braniff to negotiate with the two groups of dispatchers, and to submit to arbitration in the absence of a negotiated agreement. For the purpose

of carrying out the provisions of section 3 of the order, it is immaterial as to who is the certified representative, within the meaning of the Railway Labor Act. For, regardless of which representative is certified, there will still remain a dissident group, and *we are unwilling to allow our protective conditions to be used as a means for allowing one group to dominate the other.*

"The very purpose of the protective condition regarding integration of seniority lists is to insure that the merger will not unduly interfere with the seniority rights of the affected employees. Where, as here, Mid-Continent has disappeared as an entity, *it would frustrate our protective condition if the Braniff dispatchers were permitted to dictate the seniority rights of the Mid-Continent dispatchers.* Similarly, our protective condition would be defeated if we were to permit the Mid-Continent group of dispatchers to dictate seniority integration for the Braniff dispatchers. Accordingly, we have provided for negotiation and ultimate resort to arbitration, so as to protect the rights of both groups of employees" (footnotes omitted; emphasis added).

Similarly, in *Kent* v. *Civil Aeronautics Board*, 204 F.2d 263 (C.A. 2, 1953) *cert. den.* 346 U.S. 826, the court held that a collective bargaining agreement, made by the union bargaining agent of the carrier's employees, must yield to the paramount power of the Board to provide a solution which takes into consideration the conflicting seniority interests of both the majority and minority employee groups. These views of the court and the Board are inherently sound, and are not inconsistent with the Railway Labor Act and national labor policy of settling disputes by negotiation and arbitration.[5] In a sense, the

[5] *Outland* v. *CAB*, 284 F. 2d 224 (1960) relied on by the Petitioner, is not to the contrary. The fact that the Board did not choose to look behind the collective bargaining agreement in that case does not require it to follow that course in all cases regard-

Board's actions go beyond the Railway Labor Act in recognizing the tripartite nature of the labor dispute. But in providing for collective bargaining between affected employees and the employer, and for arbitration if negotiations fail, the Board's protective conditions are consistent with national labor policy. *John E. Wiley & Sons* v. *Livingston, supra.*

In the absence of approval of the APA-AA agreement by TCA-MEC, it is patently unsound to argue, as American does (Pet. No. 71-550, 11), that the agreement, which has status only as the proposal of two of the three parties, *must as a matter of law* be acted on by the Board before any other procedural step could be taken.[6] We need not decide whether the Board lawfully could have given priority to the APA-AA proposal over all other proposals which might be considered by the arbitrator in the arbitration proceeding. But we submit that it is absurd to argue that the Board was guilty of legal error in refusing to give preferential priority consideration to one of many possible solutions in advance of the arbitration proceeding.[7]

American seeks to establish the importance of the issue it raises by expressing fears (Pet. No. 71-550, 11)

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less of circumstances. But of even greater importance is the fact that in *Outland*, unlike the present case, the representative of the minority had agreed to the manner of integration. For what American describes as an "integration of seniority lists . . . negotiated . . . by the parties" in *Outland* was an integration negotiated by the two respective pilot groups—not by the company and one group.

[6] American professes dismay that the Board's action required the seniority question to be "submitted anew, as if no negotiations had occurred and as if no agreement had been reached." (Pet. No. 71-550, 10) In fact, the issue had not been "submitted" before and the "agreement" constituted a mere proposal.

[7] Indeed, it would follow from American's argument that even if the Board had decided to resolve the seniority issue itself, the Board was required as a matter of law to give priority consideration to the two-party agreement.

that the knowledge that compulsory arbitration is inevitable in the absence of agreement by all groups "will effectively impair the motivation of both majority and minority groups to reach reasonable agreements during negotiations". American's fears are groundless. Agreements have been reached in the past despite the "threat" of compulsory settlement by an arbitrator or the Board.[8] Out of a total of twenty-one prior flight crew seniority cases, settlement by agreement was reached in nine cases, by mediation in one, and by arbitration in ten. Record, 179a. In only one prior case (*Braniff-Mid-Continent Merger Case, supra*) has the majority representative had the temerity to assert the power to determine the rights of a minority group of employees by entering into a collective bargaining agreement with the carrier, and in that case the assertion was firmly rejected by the Board. Thus since 1952 seniority rights have been successfully determined by negotiation or arbitration despite knowledge by carriers and employees of the principles of *Braniff*.[9]

3. *No significant questions concerning unlawful delegation of the Board's decision-making responsibilities are involved.*

Relying on provisions of the Federal Aviation Act (49 U.S.C. 1301), Administrative Procedure Act (5 U.S.C. 556(b)) and Reorganization Plan 3 of 1961 (26 F.R.

[8] Moreover, American's arguments concerning motivation seem equally valid where the parties have voluntarily agreed to arbitrate if no agreement is reached.

[9] *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962), relied on by American (Pet. No. 71-550, 10), does not point to a different result. In the present case, unlike *Burlington*, (1) the Board's order does not encroach on the jurisdiction of a sister agency, (2) the Board's order recognizes its lack of expertise in labor matters, and (3) in fashioning its standard conditions the Board not only weighed the consequences of allowing a majority group to override a minority group (*Braniff-Mid Continent-Merger Case, supra*), but arrived at a solution consistent with national labor policy.

5989), Petitioners argue that the Board can not lawfully delegate its decision-making power to private parties, such as an arbitrator, and that the provision here for settlement of the seniority issue by arbitration is therefore unlawful.

Petitioners misconceive the nature of the Board's action in providing for arbitration. The Board's responsibility under section 408 of the Federal Aviation Act is to decide whether a proposed merger arrangement is in the public interest. This responsibility it cannot delegate, and has not delegated. But having decided the statutory issue and approved the merger, it also has the power, and indeed the responsibility, to impose "such terms and conditions as it shall find to be just and reasonable". 49 U.S.C. 1378(b).

There is no prohibition in the Federal Aviation Act, or elsewhere, which precludes the Board from discharging its responsibility by providing, as it did in sections 3 and 13 of the labor conditions, for negotiation and, on failure to agree, arbitration, and such procedures are consistent with national labor policy. Although facts and circumstances in a particular case may render such an arrangement unjust or unreasonable, in the present case the court below correctly found that the Board's choice of arbitration was proper. The basic reasons are the Board's lack of expertise in labor matters [10] and the fact

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[10] American asserts that, while the Board may be inexpert in labor matters, it does possess peculiar knowledge of airline operations—and an evaluation of such issues is essential to resolving the existing dispute. Pet. No. 71-550, 14-15. The Board certainly does have expertise in the latter area—but so do a number of arbitrators, who *also* have expertise in labor matters. Unfortunately, Petitioner APA has made it plain, before the Board and in the Court below, that any arbitrator with such experience is unacceptable, and American has acquiesced in APA's view. App. A15, A16, A20. Petitioners should scarcely be allowed to rely on the expertise ground just because they elect to rule out any person or agency with expertise, except for the Board.

that seniority is basically a matter for negotiation or arbitration. (App. A37)

Petitioners' contention that reconciliation of the interests of labor groups is a decision-making function which cannot be delegated is inconsistent with their support of the principle of negotiation as a cornerstone of national labor policy. If the decision must be made by the Board, that responsibility cannot be "delegated" to the interested parties—American, APA and TCA-MEC—for settlement by negotiation and agreement, any more than it can be delegated to an arbitrator. Petitioners cannot have it both ways.

Petitioner American is also troubled by the fact that no "guidelines" have been prescribed by the Board. But as the court below points out (App. A20), the arbitrator "must apply the same standard, 'the integration of seniority lists in a fair and equitable manner,' by which an examiner of the Board would be bound." Both the Board and the court below found that "American's fears with respect to the conduct of the arbitration are exaggerated." (App. A19).[11]

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[11] American cites as indefinite issues the following: (1) the identity of employee representatives; (2) the method of arbitrator selection; (3) the issues for the arbitration; and (4) the location of the arbitration (Pet. 15-16). The contentions are ingenuous. First, long before the petitions were filed, TCA MEC agreed to supply signed authorizations from each individual pilot it purports to represent, eliminating the first "vexing" area. Second, long before the petitions were filed, the parties agreed on a method of arbitrator selection. If that method proves abortive—and if there is a dispute as to the Board's intention—any party has the right to return to the Board for a clarification order, but that is a far cry from putting the whole problem back in the Board's lap. Third, the issues to be arbitrated are spelled out in the Board order—"all pending disputes with respect to the seniority list integration of the American and TCA pilots and flight engineers." (App. A39). And fourth, the location of the arbitration is obviously a frivolous objection; that decision is seldom made until an arbitrator is chosen, and the arbitrator's preference is customarily given great weight.

4. In any event the court below properly found that the appeal attacking the Board's "delegation" to an arbitrator was untimely.

The order of the Board, Order 70-12-161, imposing protective labor conditions, including sections 3 and 13 relating to negotiations and arbitration, was served on December 31, 1970. Record, 24a, 134a, 137a, 140a. American's Petition for Review was filed on June 18, 1971, seeking review of two orders of the Board, dated May 7, 1971, and June 11, 1971, which sought to implement the order of December 31, 1970. No appeal was taken from the order of December 31, 1970.

If the Board lacks authority to "delegate" a seniority dispute to a non-governmental arbitrator, the Board's unlawful delegation occurred on December 31, 1970. American cannot take advantage of the merger approval and withhold appeal of particular provisions or conditions of the approval until such time as it decides they are disadvantageous. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492. Clearly the question of the Board's legal power to "delegate" should have been appealed within the statutory 60-day period. 49 U.S.C. 1486(a). Having failed to do so, the arbitration provisions are unassailable on appeal.[12]

5. The ruling of the court below that Petitioner APA is bound by the Board's order because of APA's intervention in the Board proceeding is correct, but in any event is not essential to the lower court's decision. The Board has broad powers to deal with labor relation

[12] It should be noted that the petition of the TCA MEC, filed February 2, 1971 (Record, 143a) to which both Petitioners refer, expressly stated that it was invoking condition 13 by demanding arbitration of a dispute that had existed for 30 days (i.e., since December 31, 1970). American and APA were thus on notice well in advance of the 60-day deadline that TCA MEC construed the order imposing the labor protective conditions exactly as did the Board and the court below.

problems growing out of airline mergers, and its order could not be frustrated by the failure or refusal of APA to intervene. As the court below said (App. A21): "To say that the Board could direct an arbitral resolution but not make that resolution binding on all concerned parties would leave the Board with powers that would be more apparent than real".

Moreover, the court's ruling on intervention is correct and unexceptionable. Petitioner cannot escape the normal and universal rule that a party in an adjudicatory proceeding, whether before a court or an administrative agency, is bound by the order of the tribunal or agency.[13] Orderly procedure so requires. It would indeed be intolerable to give opportunity to a party to present its evidence and contentions, and to reach a final order based in part on such presentation, only to discover that such "order" had no higher status than an advisory opinion with respect to some of the parties.

The argument that the ruling is novel and farreaching, and will discourage participation in administrative proceedings, seeks to prove too much. A merger proceeding fixes legal rights and obligations, and is not a mere fact-gathering investigation; nor does the greater "informality" of administrative agency proceedings negate the agency's authority to issue final orders determining such rights and obligations.[14]

Petitioner APA additionally but erroneously contends that the Board lacks jurisdiction to bind APA because

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[13] APA's strained distinction between intervention in a judicial proceeding and intervention in an administrative proceeding eludes us. APA *has* intervened in the litigation in the court below and is bound by *that* decision, without considering its status before the Board.

[14] Contrary to Petitioner's belief (Pet. No. 71-489, 27), the fact that *some* intervenors in administrative proceedings do not have an appealable interest is of no significance to the present controversy. Respondents here have not contested Petitioner APA's right to appeal from the Board's order.

it lacks jurisdiction over the "subject matter". Petitioner apparently means that the Board has power to approve merger agreements (and thus has jurisdiction over American), but has no direct statutory power to compel APA and other labor groups to arbitrate if negotiation fails (and thus has no jurisdiction over APA). But this ignores the fact that the "subject matter" includes labor protective conditions, that these are directed to American, and that the impact on APA derives from the directive to American. Having participated in the administrative process of formulating the order, APA is bound by it.[18]

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[18] Since the preparation of this brief, this Court on November 15, 1971, handed down its opinion in *Norfolk & Western Ry. Co.* v. *Nemitz*, No. 70-97. The Court there held that a pre-merger labor agreement, which had been approved by the Interstate Commerce Commission as part of the merger transaction and thus became one of the conditions of the merger, could not be abrogated by a subsequent implementing agreement between the employer and authorized representative which substantially and adversely modified the compensation to be paid a minority group of employees. Although the case involved specific statutory provisions of the Interstate Commerce Act (sec. 5(2)(f)), the Court's decision supports the action of the Board and the Court below in this case: (1) The responsibility of the Commission in a merger case to impose and oversee protective conditions for minority employees, despite efforts to override the interests of such employees through recourse to the collective bargaining procedures of the Railway Labor Act, is clearly established; (2) The subsequent implementing agreement (comparable to the APA-AA agreement here) was held to be unenforceable and contrary to the Interstate Commerce Act.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 1971, copies of the Brief in Opposition for Intervenor-Respondent Master Executive Council of the Pilots of Trans Caribbean Airways were mailed, postage prepaid, to the following:

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-489

ALLIED PILOTS ASSOCIATION, PETITIONER

v.

CIVIL AERONAUTICS BOARD

No. 71-550

AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A12–A22)[1] is reported at 445 F. 2d 891. The opinions of the Civil Aeronautics Board (Pet. App. A32–A40, A25–A31) are not yet reported.

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[1] "Pet. App." references are to the appendix to the petition filed by the Allied Pilots Association in No. 71-489.

JURISDICTION

The judgment of the court of appeals (Pet. App. A23–A24) was entered on July 23, 1971. The petition for a writ of certiorari in No. 71–489 was filed on October 5, 1971; and the petition in No. 71–550 was filed on October 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board has the authority, in approving an airline merger under Section 408(b) of the Federal Aviation Act, to impose labor protective conditions which assure to responsible employee groups the right to binding arbitration of seniority disputes arising out of the merger.

2. Whether an order of arbitration by the Board may bind an employee group which has actively participated in the Board proceedings leading to issuance of the order.

STATUTES INVOLVED

Section 414 of the Federal Aviation Act (72 Stat. 737, *et seq.*, as amended, 49 U.S.C. 1384) provides:

> Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws," as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

Sections 102, 408(b), and 1006(a) of the Federal Aviation Act of 1958 (72 Stat. 737, *et seq.*, as amended, 49 U.S.C. 1302, 1378(b) and 1486(a)) are set forth at Pet. App. A1–A6. Sections 1a and 2 Fourth of the Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C 151a and 152 Fourth) are set forth at Pet. App. A7–A8.

STATEMENT

On January 22, 1970, petitioner American Airlines ("American"), together with Trans-Caribbean Airlines ("TCA"), applied to the Civil Aeronautics Board for approval of American's acquisition of TCA. After full hearings, the Board, by Order No. 70–12–161 (J.A. 24a–44a),[2] approved the proposed merger.

During the hearings, there emerged sharp differences between petitioner Allied Pilots Association ("APA"), which represented American's pilots, and the Master Executive Council ("TCA–MEC"), which represented TCA's pilots, over the labor aspects of the acquisition. The dispute concerned integration of seniority lists in the merged airline. TCA–MEC asked the Board to order binding arbitration of this pilots' dispute as a condition to approving the merger, or, alternatively, to resolve the dispute itself (J.A. 40a, n. 24). The Board denied these requests as premature. But, in its order of approval, it imposed labor protective provisions identical to those which it had regularly imposed for the past decade in merger and route-transfer cases (Pet. App. A13). Section 3 of

[2] "J.A." refers to the Joint Appendix in the court of appeals, which has been filed with the Clerk of this Court.

these provisions required fair and equitable integration of the seniority lists of both carriers, through negotiation where possible.[3] Section 13 provided that, should the parties be unable to agree, either side had the right to refer the disputed matter to binding arbitration.[4] See J.A. 40a, n. 24. Both petitioners fully accepted the Board-imposed conditions on the merger. Neither of the companies, none of the unions, nor any other person sought reconsideration of the Board's order or otherwise objected to it.

After the Board's approval of the merger, American met with APA and TCA–MEC. American and APA agreed that seniority lists should be integrated on a straight date-of-hire basis, and that furloughed pilots should be recalled on a last furloughed-first recalled basis (Pet. App. A14). TCA–MEC, however, considered these terms unfair to its men and de-

[3] Section 3 reads: "Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13."

[4] Section 13 reads: "In the event that any dispute or controversy (except as to matters arising under sec. 9) arises with respect to the protection provided herein, which cannot be settled by the carrier and the employee, or his authorized representative, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, etc., shall be agreed upon by the carriers and the employees, or the duly authorized representatives of the employees."

manded that the matter be submitted to arbitration. When American and APA refused, TCA–MEC petitioned the Board on February 2, 1971, to order the parties to submit the issue of seniority-list integration to final and binding arbitration (Pet. App. A32–A33). American and APA opposed on the ground that their agreement was fair and equitable (Pet. App. A14).[5]

While this petition was pending, American and TCA consummated the merger on March 8, 1971. Pursuant to its agreement with APA, American then integrated the active pilots on a date-of-hire basis and planned to recall furloughed pilots on a last furloughed-first recalled basis (Pet. App A33).

Thereafter, the Board, by Order No. 71–5–30 issued on May 7, 1971 (Pet. App. A32–A40), granted TCA–MEC's request for an order directing American to submit the seniority-list integration issue to final and binding arbitration (Pet. App. A36). The Board noted that, while it customarily imposed labor protective conditions in merger cases, its well-established policy was to leave resolution of disagreements concerning those matters to negotiation among the carriers and employee groups, or, negotiation failing, to arbitration (Pet. App. A36–A37). The Board disclaimed any expertise in labor relations and held that "seniority is basically a matter for negotiation or arbitration" Pet. App. A37). It observed that TCA–

[5] American, while opposing the TCA–MEC petition, conceded the Board's authority to order binding arbitration of the issue (Pet. App. A36). APA denied the Board's authority (Pet. App. A35).

MEC's claims were not frivolous, created a *bona fide* dispute, and, under the labor protective conditions, entitled TCA–MEC to binding arbitration (Pet. App. A38).[6]

American, supported by APA, petitioned for reconsideration. Noting APA's assertion that no arbitration could affect its labor contracts with American, it claimed that arbitration was thus not feasible. The Board was asked to appoint a hearing examiner to determine whether the agreement that American had reached with APA provided a "fair and equitable method of seniority integration, and, if not, to prescribe the manner in which disputes concerning the method of integration should be resolved" (J.A. 206a, p. 1).

The Board, by Order No. 71–6–71 issued June 11, 1971 (Pet. App. A25–A31), denied reconsideration. It reiterated its preference for arbitration as a means of settling labor disputes, and it stated that there is no difference in the legal effect of ordering integration of seniority lists by arbitration or by the Board's own determination after hearings (Pet. App. A26). In either event, it pointed out (Pet. App. A26–A27),

[6] The Board specified that the order of the arbitration panel would bind all employees involved in the dispute (Pet. App. A40). To insure protection of the interests of all groups, the order gave all groups of pilots and flight engineers who desire to do so the right to participate in the arbitration; it also ordered that procedures be established to insure consideration of the interests of any employee groups that might choose not to participate (Pet. App. A39–A40). At the same time the Board denied TCA–MEC's request for interim relief blocking American's implementation of its integration plan (Pet. App. A38–A39).

any alteration of rights stemming from the American-APA collective bargaining agreement would be the result of the labor protective conditions, which are superior to any private contract. *Kent* v. *Civil Aeronautics Board,* 204 F. 2d 263 (C.A. 2), certiorari denied, 346 U.S. 826.

On review, the court of appeals unanimously upheld the Board (Pet. App. A12–A22).

ARGUMENT

1. *a.* Both petitioners challenge the authority of the Board, as a condition of its approval of an airline merger, to order arbitration of a labor dispute at the behest of a labor group that does not represent a majority of the carrier's employees. Referring by analogy to the Railway Labor Act (45 U.S.C. 151a and 152 Fourth), which anticipates settlement of disputes without compulsory arbitration by negotiation between a carrier and the majority representative of the employees, they contend that the Board must be guided by similar principles in the present case (Pet. No. 71–489, pp. 14–17; Pet. No. 71–550, pp. 10–11). From this premise, petitioner APA apparently argues for a complete bar to an order of arbitration by the Board so long as the carrier and the bargaining agent of the larger of the constituent carriers can agree on a settlement (Pet. No. 71–489, pp. 16–17). Petitioner American, on the other hand, seems to take the position that the Board is required to examine all agreements between that carrier and bargaining agent; and it can order arbitration only

if it determines that their agreement is not fair and equitable (Pet. No. 71–550, pp. 10, 12).

These contentions attack only the legality of the arbitration provisions in Section 13 of the labor protective conditions; they come months after consummation of the merger pursuant to the terms of the Board's order of approval. Consequently, petitioners' arguments are untimely and are no longer available to them. In any event, they are insubstantial and do not warrant further review by this Court.

(1) In its order of approval (No. 70–12–161), the Board stated (J.A. 40a, n. 24): "After the issuance of our order establishing labor protective conditions, we expect that the pilot groups will, in accordance with the views expressed herein, abide by the labor conditions' contemplation that the rights of both pilot groups should be protected by negotiated integration of seniority lists in a 'fair and equitable manner,' and that, in the event of failure of agreement, the dispute will be submitted to arbitration."[7] The parties, including APA, were thus on notice of the intended meaning and force of the imposed conditions at the time that the merger was approved. As already noted, no party sought clarification or took exception by peti-

[7] This is consistent with the usual practice involving labor protective conditions under the Interstate Commerce Act. See, *e.g.*, *New Orleans & Northeastern Railway Co.* v. *Bozeman*, 312 F. 2d 264, 268 (C.A. 5); *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Railway Co.*, 314 F. 2d 424 (C.A. 8), certiorari denied, 375 U.S. 819. Similarly, it conforms to earlier Board orders in related fields. See, *e.g.*, *Braniff-Mid-Continent Merger Case*, 17 C.A.B. 19; *Airlift International, Inc. and the Slick Corporation*, Order #–26933.

tioning for reconsideration. To the contrary, American proceeded promptly to consummate the merger and commenced operations over the routes formerly served by TCA. It is agreed that American and its pilots thereby acquired valuable benefits. They should not now be heard to complain of the labor protective conditions on the basis of which they were permitted to acquire these benefits. As this Court stated in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 502:

> In 1951, the condition before us became an important factor in securing the Commission's finding that the merger would be in the public interest * * *. After the merger was approved on that condition, respondent sought no review of it. On the other hand, respondent consummated the merger and has enjoyed its benefit ever since. It cannot now be allowed to attack an officially approved condition of its merger while retaining at the same time all of its benefits.

Section 1006(a) of the Federal Aviation Act (49 U.S.C. 1486(a)) requires a party who wishes judicial review of a Board order to file a review petition in a court of appeals within sixty days after the entry of such order. Here, however, petitioners waited almost six months before requesting review of the order of December 31, 1970, containing the labor protective conditions they now contest. As pointed out by the court below (Pet. App. A19), they are thus foreclosed by statute from raising the arguments in their petitions. *Callanan Road Co.* v. *United States*, 345 U.S.

507, 512.[8] To be sure Section 1006(a) does permit the late filing of a review petition upon reasonable grounds shown, but petitioners have made no such showing for their extraordinary delay.[9]

(2) At all events, petitioners' challenge to the Board's authority to order binding arbitration is without merit. The Board has broad power under Section 408 (b) of the Federal Aviation Act (49 U.S.C. 1378(b)) to approve airline mergers "upon such terms and con-

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[8] Since the merger order had been approved by the President under Section 801 of the Federal Aviation Act (49 U.S.C. 1461), because it involved the transfer of foreign routes, it may well be that no review was available to petitioners under 49 U.S.C. 1486(a). See *C. & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103. Even if petitioners could bring themselves within the exception to *Waterman*, however, on the ground that they are claiming that the Board order was *ultra vires* (see *World Airways* v. *Pan American World Airways, Inc., et al.*, 391 U.S. 461; *American Airlines* v. *Civil Aeronautics Board*, 348 F. 2d 349 (C.A.D.C.), the time within which they could raise that claim had long since expired when this suit was commenced (see 49 U.S.C. 1486(a)).

[9] Indeed, APA offers no excuse other than that in the statutory period for review of the order it did not believe that the Board had really given TCA–MEC the right to arbitration (Pet. No. 71–489, p. 25). But the Board's order was entirely clear on this point, and, as subsequent events proved, it meant just what it said. Petitioner American contends that to have timely challenged the labor protective provisions would have been inconvenient, for American would have had to challenge "the entire merger for which it sought Board approval" (Pet. No. 71–550, p. 17). But American, of course, could have challenged only that part of the order to which it objected. And it was American which sought approval of the merger to begin with: one of the reasonable burdens it must bear as an applicant is timely objection to any Board action concerning the merger which it thinks unlawful.

ditions as it shall find to be just and reasonable." As petitioner APA concedes (Pet. No. 71–489, p. 14), this empowers the Board to impose conditions to protect the employees of the merging carriers. *Kent* v. *Civil Aeronautics Board,* 204 F. 2d 263 (C.A. 2), certiorari denied, 346 U.S. 826; *United States* v. *Lowden,* 308 U.S. 225. In the exercise of this power, the Board may prescribe compulsory arbitration as a means for resolution of labor disputes arising out of mergers, including disputes over seniority lists. See *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.,* 314 F. 2d 424 (C.A. 8), certiorari denied, 375 U.S. 819.

Nor is it precluded from doing so by the Railway Labor Act, which requires settlement of "major disputes" solely by voluntary procedures, but permits binding arbitration with respect to "minor disputes." See *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.,* 353 U.S. 30, 33. It is doubtful whether the dispute here over integration of seniority lists can be considered of "major" proportions within the parlance of that statute. Even assuming that it can, however, the proscription against submitting such disputes to binding arbitration under the Railway Labor Act has no application in this case. Section 414 of the Federal Aviation Act (49 U.S.C. 1384) explicitly relieves "[a]ny person affected by any order" from "all other restraints or prohibitions made by, or imposed under, authority of law * * *." See *Brotherhood of Locomotive Engineers* v. *Chicago &*

North Western Ry., supra; cf. *Norfolk and Western Railway Company* v. *Nemitz,* No. 70–97, decided November 15, 1971, slip op. p. 4.

Moreover, despite the fact that it had full power to resolve the present dispute over seniority lists (see *Kent* v. *Civil Aeronautics Board, supra*), the Board quite appropriately chose to remit the parties to the traditional labor procedures of negotiation and arbitration (see Pet. App. A20, A21). It was never contemplated that, in the exercise of its responsibilities to impose just and reasonable conditions, the Board would sit as a labor tribunal to adjudicate every labor dispute connected with a merger. Moreover, as the Board candidly admitted in this case, it possesses no special expertise in labor relations. See *Outland* v. *Civil Aeronautics Board,* 284 F. 2d 224 (C.A.D.C.).

Thus, its decision here was an eminently reasonable way of insuring that, following the merger, the dominant group would not unwarrantably subordinate the interests of the acquired carrier's employees, who are now a minority. *Braniff-Mid-Continent, supra,* 17 C.A.B. at 21–22.[10] Indeed, this concern with the rights

[10] This, of course, does not mean that "any minority, no matter how small" (Pet. No. 71–550, p. 11), could, by its failure to agree, force compulsory arbitration. Indeed, the Board has specifically declined to order arbitration of a dispute over seniority-list integration when requested by dissatisfied non-representative minorities. See *Universal Airlines Company,* Order No. 71–9–24 (September 3, 1971); cf. *Outland* v. *Civil Aeronautics Board,* 284 F. 2d 224 (C.A.D.C.). Rather, its concern is with the grievances of genuinely representative minority groups that result from the Board's approval of a merger.

of the minority employee-group is coincident with the policies underlying the Railway Labor Act (*Steele* v. *Louisville & Nashville Ry. Co.*, 323 U.S. 192), and the pre-existing collective agreements between American and APA must yield to the paramount authority of the Board to effectuate a solution for the benefit of all employees affected by a merger. *Kent* v. *Civil Aeronautics Board, supra,* 204 F. 2d at 265–266.

Burlington Truck Lines v. *United States,* 371 U.S. 156, relied on by American (Pet. No. 71–550, p. 10), is not to the contrary. In that case, this Court set aside an order of the Interstate Commerce Commission, certifying a new trunkline carrier, on the ground that the Commission had not given adequate reasons to justify its grant of new authority instead of ordering the existing trunklines to handle all shipments. *Id.* at 167–168.[11] It noted that the Commission should consider the impact of its remedy upon national labor policy so as not to trench upon the jurisdiction of its sister agency, the National Labor Relations Board (*id.* at 173–174).

Here, by contrast, there is no problem of trespassing by the Civil Aeronautics Board upon the province of another agency expert in labor matters. The Board in fact deferred to the expertise of the National Mediation Board, stating that that agency was available to assist the parties in settling the dispute.

[11] The existing trunkline service was allegedly inadequate because of a labor dispute in which certain short-haul carriers became the target of a secondary boycott by the Teamsters Union. The National Labor Relations Board had found the boycott to be unlawful and had ordered that it terminate.

And, by leaving the seniority list dispute to negotiations and expert arbitration, the Board here, unlike the Commission in *Burlington*, avoided the danger of possibly contravening national labor palicy "because of lack of expert competence" (371 U.S. at 173).[12] Thus, as the court of appeals stated (Pet. App. A18): "If the Board's experience convinced it that the integration of seniority lists of employees of merging carriers was a function which it was not well suited to perform and which, in the absence of agreement, had best be left to arbitration, that was a judgment it was competent to make."[13]

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[12] Contrary to the assertion of petitioner APA (Pet. No. 71–489, pp. 9–10), *McGuire* v. *Humble Oil and Refining Co.*, 355 F. 2d 352 (C.A. 2), is not in conflict with the decision here. Neither company to the merger involved in *McGuire* was subject to the jurisdiction of the Civil Aeronautics Board, and Board approval under the special provisions of Section 408(b) was not required for the merger. That case thus has no application to the wholly different situation presented by the airline merger involved in this case. Cf. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543.

[13] To the extent petitioners argue that, aside from the general applicability of the policies underlying the Railway Labor Act, special circumstances in this case make the Board's order of arbitration arbitrary, that argument is equally unpersuasive. The Board properly found that there was a "bona fide dispute of a non-frivolous nature" (Pet. App. A38) which could not be resolved by negotiation to the satisfaction of the three parties. In such circumstances, it is the Board's general policy to provide for arbitration (see n. 7, *supra*), and it did so here. In view of the Board's lack of expertise in these labor matters and, as the court below stated, the "exaggerated" (Pet. App. A19) nature of American's fears about the conduct of the arbitration, it cannot be said that the Board acted unreasonably in ordering the dispute to bind arbitration.

b. Petitioners' challenge to the Board's authority to delegate to an arbitrator the responsibility of resolving the labor disputes involved here (Pet. No. 71–489, pp. 18–22; Pet. No. 71–550, pp. 13–18) is also essentially an attack on the legality of Section 13 of the labor protective provisions of Order No. 70–12–161. As such, it is out of time under 49 U.S.C. 1486(a). Unlike *Oling* v. *Air Line Pilots Association,* 346 F. 2d 270 (C.A. 7), certiorari denied, 381 U.S. 926, on which petitioner APA relies (Pet. No. 71–489, p. 25), this is not a later suit contesting the fairness of the arbitration proceedings that were ordered by the Board, or disputing the arbitrator's award.

In any event, the contention that the arbitration requirement amounts to a delegation of the Board's functions misconceives the nature of the Board's responsibility. That responsibility is to impose conditions upon mergers which are appropriate for the protection of employees, and thereafter in proper circumstances to order compliance with them.[14] These responsibilities have been fully discharged by the Board (cf. *Norfolk & Western Railway Co.* v. *Nemitz, supra*); petitioners' contention that the Board itself must integrate the seniority list is merely a variation of the central theme that arbitration is not a proper remedy.

2. Finally, the Board has the power to bind APA by its arbitration order. Admittedly, it has power to bind the carrier (Pet. No. 71–489, p. 26). It also has

[14] This latter responsibility is equally that of a court to which application may be made by an employee for enforcement of the condition.

the responsibility under Section 408(b) to see to it that there is a resolution of labor problems arising from mergers which it approves. Cf. *United States* v. *Lowden,* 308 U.S. 225. APA was an active participant in the Board proceedings that led to the arbitration order of May 7, 1971. As pointed out by the court of appeals (Pet. App. A21): "To say that the Board could direct an arbitral resolution but not make that resolution binding on all concerned parties would leave the Board with powers that would be more apparent than real."

CONCLUSION

For the reasons stated, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1971

Docket No. 71-489

AMERICAN AIRLINES, INC.,
Petitioner,

and

ALLIED PILOTS ASSOCIATION,
Intervener-Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

and

MASTER EXECUTIVE COUNCIL OF THE PILOTS OF TRANS CARIBBEAN AIRWAYS,
Intervener-Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPPLEMENTAL BRIEF

In accordance with Rule 24(5) of this Court's rules, U. S. Sup. Ct. R 24(5), this Supplemental Brief is submitted concerning the case of *Norfolk & Western Railway Co.* v. *Nemitz*, 78 LRRM 2723 (November 15, 1971), which was unreported at the time of the submission of Intervener-Petitioner's Petition for Certiorari. Since this case was cited by the Respondent but does, in fact, support this petition, we believe it is appropriate to comment upon it to the Court.

The *Norfolk* case involved the consolidation of two railroads and arose under provisions of the Interstate Commerce Act, 49 U.S.C. §1, *et seq.* In that case, the acquiring railroad entered into an agreement with a number of unions representing employees on the acquired railroad, prior to the approval of the consolidation by the Interstate Commerce Commission, whereby the employees of the acquired railroad were guaranteed employment on the acquiring railroad in addition to other job-related guarantees. In approving the consolidation the I.C.C. stated that the aforesaid agreement was made pursuant to and in conformity with a section of the Interstate Commerce Act requiring the protection of affected employees following a merger or consolidation. Subsequent to the consolidation, a group of employees formerly employed by the acquired railroad claimed that they had been adversely affected by the consolidation and claimed that certain guarantees intended to compensate them therefor were not being lived up to by the railroad. Arbitration pursuant to the collective agreement was agreed upon. However, at that point, the railroad and the union representing its employees entered into an agreement which substantially reduced the benefits previously guaranteed the grieving employees. This Court held that the post-consolidation agreement abrogated the guarantees agreed upon prior to the merger and incorporated in the I.C.C.'s protective conditions as a condition of the merger. In so holding, this Court stated:

> "When there is a collective agreement and the Commission, as here, adopts or approves it, the 'notwithstanding' sentence of §5(2)(f) is not, as suggested, read out of the Act. The collective agreement then becomes a 'condition' of the Commission's 'approval' of the consolidation under the first sentence of §5(2)(f)

> and its provisions are deemed by the Commission to be 'a fair and equitable arrangement to protect the interests' of the employees within the meaning of the first sentence. Thus the significance of the 'notwithstanding' proviso is that it provides the machinery for the terms of a pre-merger collective agreement and thus supplies the minimum measure of fairness required under the first sentence of §5(2)(f)." *Norfolk & Western Ry. Co.* v. *Nemitz*, 78 LRRM at 2723.

Norfolk is authority for the proposition that the administrative agency approving a merger must consider the agreement reached by the representatives of the affected parties in contemplation of that merger and, if deemed by that agency to be a fair and equitable arrangement, incorporate that agreement into the order approving the merger. Clearly, the ICC was without authority to approve an inequitable agreement and therefore it had to pass upon the fairness of the agreement presented to it. As previously stated, in the instant case, the Civil Aeronautics Board has steadfastly refused to shoulder this basic reviewing task, choosing rather to shunt this determination off to an unnamed independent private third party arbitrator.

The central issue in *Norfolk* was both the authority and responsibility of the ICC (here, the CAB). The reason why the post-merger agreement failed was not, apparently, because it was unfair as a matter of law. Its defect was, rather, that it was in major conflict with the Commission's order *as it incorporated* the pre-merger agreement. This Court held that once the Commission had exercised its authority it could not abandon it to uncontrolled modification by third parties. It reaffirmed the fact that seniority integration secures its vitality from

action *by the Commission.* The *Norfolk* decision is directly contrary to the CAB's position that it can avoid its responsibility by simply pointing to some private dispute settlement procedure outside the administrative governmental framework.

The dissenting Justices in *Norfolk* expressed proper concern with the impact of that decision on the process of collective bargaining. However, we are certain that both the majority and dissent concur in their belief that the collective bargaining process is the preferred mode of settlement and that the Commission acted properly in approving the pre-merger agreements. Here the CAB did not even consider the agreement submitted to it. Then—despite the fact that there was no agreement for third party arbitration—the CAB moved on to its other concerns, leaving these critical issues to be determined by other authorities. *Norfolk's* emphasis on the Agency's own action certainly condemns this type of irresponsibility.

Conclusion

We believe that the Court's recent decision in the *Norfolk* case supports the instant petition for certiorari.

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